TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 260.

OLIVER [illegible], ASSIGNEE IN BANKRUPTCY OF THE [illegible] INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

[illegible] A. KENT.

IN ERROR TO THE [illegible] COURT OF THE TERRITORY OF WYOMING.

FILED SEPTEMBER 7th, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 260.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY OF THE GREAT WESTERN INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS A. KENT.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WYOMING.

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1 UNITED STATES OF AMERICA, *ss:*

Supreme court of Wyoming Territory.

The United States of America to the judges of the supreme court of the Territory of Wyoming, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is before you in said supreme court, between Thomas A. Kent and Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company of Chicago, State of Ill., a manifest error hath happened, to the great damage of the said Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, as by his complaint appears, and it is being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1879, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first day of August, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th year.

[SEAL.] J. W. BRUNER, *Clerk.*

2 (Indorsed:) Supreme Court of the United States vs. . Writ of Error. Filed August 1st, 1879. J. W. Bruner, clerk.

3 Be it remembered that heretofore, to wit, that on the 21st day of November, A. D. 1877, there was filed in the clerk's office of the supreme court of Wyoming Territory a petition in error and transcript of record in the words and figures following, to wit:

Petition in error.

Territory of Wyoming.—In supreme court.

THOMAS A. KENT, PLAINTIFF IN ERROR,
vs.
CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, defendant in error.

The said Thomas A. Kent, plaintiff in error, complains of the said Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, for that the said Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, at the November,
4 A. D. 1876, term of the district court for the first judicial district of Wyoming Territory, in and for the county of Laramie, re-

covered a judgment by the consideration of said court, wherein the said Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, was plaintiff, and the said Thomas A. Kent was defendant, a copy of the record of the judgment and proceedings in which case, containing all the errors complained of duly certified, is hereto attached, marked A and made a part of this petition; and the said Thomas A. Kent avers that there is error in the said record and proceedings in this, to wit:

1. That the verdict rendered by the jury on the trial of said cause was not sustained by sufficient evidence.

2. That said verdict was contrary to law.

3. That the district court erred upon the trial of said cause in
5 permitting the plaintiff to file a reply in the cause after the jury was empannelled and sworn for the trial of the cause and after the cause was proceeding to trial.

4. That the district court erred on the trial of said cause in overruling the defendant's motion to dismiss the cause after reply was permitted to be filed.

5. That the district court erred on the trial of said cause in overruling the defendant's motion to order a nonsuit in the cause after the reply was permitted to be filed.

6. That the district court erred on the trial of said cause in overruling the defendant's motion for a continuance of the cause after the reply was permitted to be filed.

7. That the district court erred on the trial of this cause in sustaining plaintiff's motion for leave to file a reply after the jury had been empannelled and sworn to try the cause.

8. That the district erred on the trial of said cause in
6 overruling defendant's objection to the introduction to the jury of the laws of the State of Illinois so far as the same were offered in evidence by the plaintiff.

9. That the district court erred on the trial of this cause in admitting in evidence, over defendant's objection, proceedings reincorporating the Great Western Insurance Company and authorizing its capital stock to be increased to five million dollars.

10. That the district court erred on the trial of this cause in giving in evidence to the jury, over the defendant's objection, a certified copy of annual statement of Great Western Insurance Company to the auditor of the State of Illinois.

11. That the district court erred on the trial of this cause in permitting to be given in evidence to the jury document designated and numbered on the trial 3½.

12. That the district court erred on the trial of said cause in permitting to be given to the jury in evidence, over defendant's objec-
7 tion, the deed of assignment numbered 7.

13. That the district court erred on the trial of this cause in permitting to be given to the jury, over defendant's objection, the certified copy of notice alleged to have been published in the Chicago Daily Inter-Ocean.

14. That the district court erred on the trial of said cause in permitting to be given to the jury in evidence over defendant's objection, the pamphlet publication alleged to have been prepared and distributed by the Great Western Insurance Company.

15. That the district court erred on the trial of this cause in permitting to be given to the jury in evidence over defendant's objection, the certificate of stock.

16. That the district court erred on the trial of this cause in permitting to be given to the jury, over defendant's objection, alleged copy of list of stockholders at Cheyenne, and copy of original stock-book of Great Western Insurance Company.

8 17. That the district court erred on the trial of said cause in permitting to be given to the jury certified copy of notification to assignee of his appointment and his acceptance.

18. That the district court erred on the trial of said cause in giving to the jury the following instruction numbered 2, requested by plaintiff's attorney:

"Defendant alleges in his answer, in substance, that he became a stockholder in said company, if at all, by virtue of a certain contract which bound him to pay for stock purchased only 20 p'r cent. of its par value, and released him from all further liability as owner or holder thereof, and further alleges that having paid said 20 p'r cent. and in this case even more, he has fully discharged all obligations incumbent upon him under his said contract. Defendant also alleges that he entered into such contract by reason of false statements of cer-

9 tain agents of the company upon which he relied, and in consequence thereof claims to be released from liability to the assignee and creditors of said company."

19. That the district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following instruction numbered three, requested by plaintiff's attorney:

"You are instructed that if defendant authorized his name to be used as a subscribed for stock and authorized his name to be placed on the stock books of the company as a stockholder, or accepted and received certificates of stock from the company, the relation of stockholder was thereby created, entitling him to all the benefits of that relation and casting upon him all the responsibilities and liabilities thereof."

20. That the district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following instruction numbered 4, requested by plaintiff's attorney:

10 "So if the company knowing that defendant was the owner of stock, whether by subscribtion or purchase, and accepted him as such by placing his name upon the stock books of the company, whether he requested them to do so or not, the relation of stockholder with all its incidents was thereby created."

21. That the district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following instruction numbered 5, requested by plaintiff' attorney.

"So if you find from the evidence that defendant subscribed for stock of the company or authorized his name to be sent to the company as a subscriber to its capital stock, whether such authority was given by him orally or in writing, and *and* that he thereafter received the evidence of his ownership in the form of certificates, he thereby became a stockholder and liable as such."

11 22. That the district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following instruction, numbered 6, requested by plaintiff's att'y:

"The assignee of stock is liable for calls made after he has been accepted by the company as a stockholder, and the issuance to him of a new certificate in lieu of the one transferred, or with the knowledge of such transfer the placing of his name upon books of the company by it, constitutes an acceptance of him as a stockholder and makes him liable as such. If, therefore, you find from the evidence in this case

that defendant did purchase from Joslin & Park ten shares of the capital stock of the company held by them, that the company placed his name upon their books or issued to him a new certificate in lieu of the one so purchased, you are instructed that he thereby became a
12 stockholder in said company and liable as such."

23. That the district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following instruction, numbered 7, requested by plaintiff's attorney:

"The stockholders and corporators of the Great Western Insurance Company of Chicago were severally liable for all debts of the company to the amount of stock by them subscribed and owned, and were liable for all calls thereon for the purpose of paying such debts until the entire amount so owned by them had been paid in, and were so liable without any express promise to that effect; and any contract between the company or its agents and them limiting their liability thereon to 20 p'r cent. or any sum less than the face or par value of the same is void both as to the creditors of the company and its assignee in bankruptcy. If, therefore, you find from the evidence in this case that defendant, T. A. Kent, became a stockholder of the Great Western
13 Insurance Company either by subscription or purchase, and that he continued to own and hold said stock until after the insolvency of the company, he is liable as such stockholder to the creditors of the company or their representative, the assignee, to the full amount of stock so owned or held by him, and any representations or agreements by or with the company or its agents limiting his liability to 20 p'r cent. of the stock or any endorsement on the stock of the word non-assessible are wholly immaterial, and constitute no defense whatever to this action. It was not in the power of the company or its agents to release him from the smallest portion of his obligation as stockholder to the creditors of the company by any agreement, however solemn, or any device, however ingenious."

24. That the district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following *the following*
14 instruction, numbered 8, requested by plaintiff's attorney:

"The law of a place to which a contract is made subject enters into and becomes a part of it, and whatever parties may stipulate they necessarily contract with reference to the law governing them and the contract and are bound to know it, or are at least bound by it whether they know it or not, and cannot be heard to urge ignorance of the law as an excuse or defense."

25. That the district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following instruction, numbered 9, requested by plaintiff's attorney:

"The Great Western Insurance Company was a corporation organized under the laws of Illinois. It had no life or power except such as were conferred by the laws of that State. Its limitations and liabilities and those of its stockholders were imposed by the same laws.
15 Any person becoming one of its corporators by subscription or purchase of stock voluntarily subjected himself to the liabilities and incidents of that relation imposed by those laws, and was at least bound to use care, attention, and diligence to ascertain his position. A representation of what the law will or will not permit to be done is one on which a party to whom it is made has no right to rely, and if he does so it is his own folly, from the consequences of which the law will not relieve him. If in this case you find from the evidence that T. A. Kent became a stockholder in this company on or about the 1st of Janu-

ary, 1871, and had notice by the statement on the face of his certificate of stock or otherwise that as such stockholder he was subject to the laws of the State of Illinois, and that he did not at once and diligently proceed to ascertain his position and responsibilities as such under those laws and make his choice of retaining his position or abandoning it, but neglected to do so until the commencement of this suit, in that case the law refuses him a remedy, and his defense of false statements as to the legal effect of his contract by which he was induced to become a stockholder can avail him nothing and constitutes no defense whatever to this action, and should be disregarded by you entirely."

26. That the district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following instruction, numbered 10, requested by plaintiff's attorney:

"The contract, by which the stock was to be non-assessible after payment of the first 20 p'r cent. thereof, though it might bind the company in an action between itself and a stockholder, is not valid or binding as between its assignee in bankruptcy and the holders of stock, & constitutes no defense to an action by him for the full amount of the stock, or the unpaid portion thereof."

27. That the district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following instruction, numbered 11, requested by plaintiff's attorney:

"Fraudulent representations, even if made by the company or its agents in procuring subscriptions for stock, cannot be set up as a defense to the recovery on the stock by the creditors of the company, or their representative, the assignee in bankruptcy."

28. That the district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following instruction, requested by plaintiff's attorney, numbered 12:

"The certificates of stock and the bond given to secure the payment of the first twenty per cent. due thereon must be taken and construed together, and not as separate or independent contracts; and if you find from the evidence in this case that T. A. Kent, in consideration of his receiving ten shares of the capital stock of the Great Western Insurance Company of the par or expressed value of one hundred dollars each, gave his bond to said company for $200.00, or 20 per cent. thereof, and that at or about the same time accepted a certificate for ten shares of such stock, then in that case you are instructed that the payment by said Kent to the company of the full amount of the bond is but the liquidation of a portion of the sum due on the stock held by him, and constitutes no defense to an action by the assignee to recover the balance due thereon upon assessments lawfully made, and the defendant is liable in this action for the full amount unpaid and due on said stock to the same extent, and with like effect, as if said bond had not been given."

29. That the district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following instruction, numbered 13, requested by plaintiff's attorney:

"The set-off or counter-claim interposed by the defendant to the plaintiff's action, as stated in his petition, constitutes no defense to the action, nor can it be allowed as against the assignee, and all evidence in regard thereto should be disregarded by you in making up your verdict."

30. That the district court erred on the trial of said cause in giving

and refusing the instructions of the parties to the cause with oral qualification, application, and explanation.

31. That the district court erred on the trial of said cause in
20 sending to the jury, when they retired to consider their verdict, the instruction requested by plaintiff, numbered 14, which the court had refused to give.

32. That the district court erred on the trial of said cause in refusing to give to the jury the following instruction, numbered 1, requested by defendant's attorney:

"The law frequently supplies by its implications the wants of express agreements between parties, but it never overcomes by its implications the express provisions of parties."

33. That the district court erred on the trial of said cause in refusing to give to the jury the following instruction, numbered 2, requested by defendant's attorney:

"If the express provisions of a contract are legal the law yields to them, and does not put in their stead what it would have put by implication if the parties had been silent."

21 34. That the district court erred on the trial of said cause in refusing to give to the jury the following instruction, numbered 5, requested by defendant's attorney:

"The courts of this Territory are not presumed to know the laws of the State of Illinois, or any other State, and cannot take judicial knowledge of them until they are legally proven. Private citizens of the Territory are held to no greater knowledge of the laws of other States than the courts, and are not presumed to know the provisions of the laws of other States. It may be proven that they have knowledge of those, or that, by the exercise of due diligence which they were bound to exercise, they might have known them."

35. That the district court erred on the trial of said cause in refusing to give to the jury the following instruction, numbered 6, requested by defendant's attorney:

"Before the defendant Kent can be made liable in this action
22 upon the stock which it is alleged that he purchased from Joslin & Park, it must have been shown that his name has been registered on the stock-books of the company issuing the stock, as a corporator."

36. That the district court erred on the trial of said cause in refusing to give to the jury the following instruction, numbered 7, requested by defendant's attorney:

"Unless the stock alleged to have been purchased from Joslin and Park by the defendant Kent was transferred to Kent on the books of the company which issued the stock of such transfer has been waived, the defendant Kent is not liable for any assessment upon such stock."

37. That the district court erred on the trial of said cause in refusing to give to the jury the following instruction, numbered 9, requested by plaintiff's attorney:

"The jury are the exclusive judges as to whether any fact put in issue by the pleadings has been proved."

23 38. That the district court erred on the trial of said cause in making oral comments, over defendant's objection, in the presence and hearing of the jury in connection with the giving and refusing of the several instructions requested to be given the jury by the defendant in this action.

39. That the district court on the trial of said cause in refusing the defendant the right to request the jury to find special answers to the following questions, viz:

"1. Was the contract between the Great Western Insurance Company and the defendant the contract alleged by the plaintiff in his petition, or was it the contract alleged in the answer by the defendant?

"2. Did the defendant, at the time of making the contract, know the provisions of the statute laws of Illinois relating to insurance corporations and the liabilities of their stockholders; or did he know
24 them at any time prior to the bankruptcy of the Great Western Insurance Company; and under all the circumstances surrounding his relations, did he use reasonable diligence to learn what his liabilities were?

"3. Were the statements and representations of the Great Western Insurance Company, by and through its authorized agent, made to the defendant at the time he made the contract believed by the defendant and relied upon by him, and were such statements and representations untrue when made?"

40. That the district court erred on the trial of said cause in giving to the jury the following instructions, over the defendant's objection, in the instructions given on motion of court:

"I then opened the door to both parties to introduce a large amount of evidence, and I now have become fully satisfied that a large portion of this evidence should not have been admitted, and is now ruled out."

25 41. That the district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following instruction in the instructions given on motion of court:

"It is shown by the evidence that the Great Western Insurance Company was duly incorporated by virtue of the laws of the State of Illinois, that an agent of the company came to this Territory to procure subscriptions, and establish a branch office at Cheyenne. The petition of plaintiff alleges further that the defendant, in this action became a subscriber to the amount of ten shares; the par value of these shares was one hundred dollars each, on which several payments have been made; and also claiming that a large portion of the subscription yet remains due and unpaid. The petition further alleges that the defendant purchased or in some way became liable for a like sum alleged to be due on ten shares subscribed for Messrs. Joslin & Park,
26 amounting in the aggregate to the sum of $1,200.00, with interest at the rate of 12 per cent. per annum from the date at which the unpaid portion of the subscription became due. To these allegations the defendant has filed an answer admitting that the Great Western Insurance Company is a body corporate, and that he did subscribe for ten shares of the capital stock of said company, but alleges that he did not become liable for any sum of money beyond the sum of $200.00 under a contract of subscription, and denies all the other allegations of plaintiff's petition."

42. That the district court erred on the trial *on the trial* of said cause in giving to the jury, over defendant's objection, the following instruction in the instructions given on motion of court:

"The defendant secondly set up a defense that he was unacquainted with the laws of Illinois, under which said co. was incorporated,
27 and that if he ever was by reason of such subscription liable for the whole amount of the par value of the stock, that there were such fraudulent representations made to him to induce his subscription as removes all liability on account of the subscription.

"Thirdly. Defendant sets up a counter-claim which considerably overbalances the claim of plaintiff, and which, if allowed, would result in a verdict for the defendant."

43. That the district court erred on the trial of this cause in giving to the jury, over defendant's objection, the following instruction given on motion of court:

"I may remark that there is but little attempt at denial."

44. That the district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following instruction in the instructions given on motion of court:

"Then the fact of the subscription to the capital stock,
28 to the amount of ten shares, and the subsequent possession of ten more shares from Joslin & Park, being admitted, it becomes a question of fact as to what was the par value of the stock. This you will find from the pleadings, and when that question shall have been disposed of, you are next to find how much has been paid per share. This inquiry will determine the amount still due, because I now instruct you, as a matter of law, that you are to disregard all other questions."

45. That the district court on the trial of said cause in giving to the jury, over defendant's objection, the following instruction in the instructions given on motion of court: "It is altogether likely, in fact highly probable, from the well-known high standing of Mr. Kent in this community, that his statements in regard to the inducements held out to him to become a contributor to the capital stock of the said
29 Great Western Insurance Company are strictly true. It is also, no doubt true that Mr. Kent subscribed for the stock without knowing the nature of the laws of the State of Illinois. But none of these things can be successfully pleaded so as to release him from his obligation to pay the full par value of the stock. It may be that ignorance of the laws of Illinois might be plead in bar, to some actions against non-residents of that State, but such want of knowledge can avail him nothing in this action.

"Nor can he set up a contract of the nature of the one set out in the answer to relieve him of his obligations, because when he became a subscriber to the capital stock of the Great Western Insurance Company he became one of the corporators entitled to participate in all its proceedings, share its profits, and assume its liabilities, just the same as he would have done if he were a citizen of Illinois. In other words, had he entered into a partnership in a commercial or any other
30 enterprise to be carried on in the city of Chicago, and the members of the firm by their business operations had become embarrassed, Mr. Kent would have been bound for the liabilities of the firm in the same manner and to the same extent as the active business managers of *of* the partnership, although he had never been in Chicago. If that is the case with an ordinary association of men in a business adventure, why should Mr. Kent be treated in any other way when associated with other members of a firm working under a charter of incorporation; because an incorporated partnership working under a charter, for the convenience of doing business, by a president and a board of directors, is neither more nor less than a partnership. Hence it cannot avail the defendant in this action to plead ignorance of laws which he had an opportunity to know, and which he was compelled to know or take the consequences of his own neglect.

31 "This plea might have been set up if suit had been brought by the corporation to recover the balance of the par value of the shares of stock held by the defendant; so also might be set up the contract which he signed under such an action. But this is an action brought not by the corporation but by its creditors, by their agent,

Mr. Upton, who has been made the receiver for the creditors, and is bound by virtue of his commission as assignee to marshall the assets of the corporation, and not only of the corporation but of its constituents, and when so marshaled to pay the corporation debt. There is this difference between an incorporated co. and an ordinary copartnership; while under the latter one of its members may become liable for all the debts of the firm, here he is only liable to the amount of his unpaid subscription."

46. That the district court erred on the trial of said cause in
32 giving to the jury, over defendant's objection, the following instruction in the instructions given on motion of court:

"In some of the States a member of a corporation becomes liable to creditors for all the debts of such corporation, but that extent of liability is not claimed in this case, but only to the amount of his subscription to the capital stock to this amount. I say to you as a question of law he is unquestionably liable."

47. That said district court erred on the trial of said cause in giving to the jury, over defendant's objection, the following instruction in the instructions given on motion of court:

"Finally, I submit to you the only questions on which you are to *to* pass upon, all others being withdrawn from you. These questions are as follows:

"1st. Did the defendant subscribe for ten shares of the capital stock of the Great Western Insurance Co.?

"2nd. Did the defendant become the holder and owner of ten
33 other shares originally subscribed for by Messrs. Joslin & Park?

"3rd. Was the par value of that stock one hundred dollars?

"4th. If you shall find from the evidence that he did so subscribe for the stock, and did become the owner and holder of Joslin & Park's stock, you will find—

"5th. How much has he paid on his first ten shares, and how much has been paid on Joslin & Park's' ten shares, and how much remains due? And if you find that amount, this will have to be the amount of your verdict."

48. That the district court erred on the trial of said cause in overruling defendant's motion to vacate and set aside the verdict of the jury and grant a new trial in said cause. Wherefore the said Thomas A. Kent, plaintiff in error, prays that the said judgment may be reversed, and he be restored to all things he has lost by reason thereof.

W. W. CORLETT,

34 *Attorney for Plaintiff in Error.*

(Endorsed on the back as follows:) Territory of Wyoming. In supreme court. Thos. A. Kent, pl'ff in error, vs. Clark W. Upton, assignee, &c., def't in error. Petition in error. Filed November 21st, 1877. J. W. Bruner, clerk of supreme court. W. W. Corlett, att'y for pl'ff in error.

A.

Be it remembered that heretofore, to wit, on the 8th day of April, A. D. 1876, a petition was filed in the office of the clerk of the district court in and for the county of Laramie, in the Territory of Wyoming, in the words and figures following, to wit:

In the district court of the 1st judicial district of Wyoming Territory, in and for Laramie County, ss.

35 CLARK W. UPTON, ASSIGNEE IN BANKruptcy of the Great Western Insurance Company, plaintiff,
vs.
THOMAS A. KENT, DEFENDANT.

Petition.

Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, plaintiff above named, complains of Thomas A. Kent, defendant, for that the Great Western Insurance Company is a body corporate, heretofore created and existing under the laws of the State of Illinois, having its principal office and place of business in the city of Chicago, in said State, was duly constituted a body corporate by virtue of an act of legislature of the State of Illinois, entitled an "Act to incorporate the Great Western Insurance Company, of Chicago, Illinois," approved February 4th, A. D. 1877, and as such corporation had full power and authority to make contracts for sub-
36 scriptions to its capital stock, and to issue certificates therefor, and that by the terms of said act the capital stock of said company was fixed at five hundred thousand dollars; that said company had power under its said charter to make contracts of insurance and take risks on all kinds of property, and to charge and receive prem*premi*ums therefor. Plaintiff avers that afterwards, to wit, on the 25th day of June, 1870, said Great Western Insurance Company was reorganized by the stockholders and directors thereof, under the general incorporation acts of the State of Illinois, and its capital stock authorized to be increased to five millions of dollars; that said capital stock was divided into shares of one hundred dollars each, the subscription and payment for which stock constituted its only fund and means of paying the losses it might meet in the prosecution of its business; that by its charter said corporation was empowered to do any and
37 all acts consistent with the constitution and laws the State of Illinois; that by the laws of the State of Illinois, in such case made, it was provided that the corporaters of any insurance company organized in the State of Illinois should severally be liable for all debts and responsibilities of such company to the amount of stock by him or them subscribed, until the whole amount of the capital stock of such company shall have been fully paid in and a certificate thereof recorded.

Plaintiff avers that the defendant, Thomas A. Kent, is a citizen of the Territory of Wyoming, and a resident at Cheyenne, county of Laramie in said Territory, and that said defendant heretofore, to wit, on or about the 1st day of January, A. D. 1871, made and entered into a contract of subscription, and subscribed for ten shares of the capital stock of said Great Western Insurance Company of one hundred dollars each, and became indebted and obligated to pay therefor
38 the full amount of said stock, to wit, the sum of one thousand dollars as follows: Five per cent. of said sum to be paid down or upon delivery of certificates of the stock subscribed for; five per cent. in three months from the date thereof; five per cent. in six months from the date thereof; and five per cent. in nine months from the date thereof, and the balance, to wit, eighty per cent. thereof,

whenever lawfully called upon therefor, according to the charter of said company, and the laws of the State of Illinois, under which said organization existed. Plaintiff avers that said Great Western Insurance Company did execute and deliver to said defendant certificates for ten shares of its capital stock, in pursuance of said subscription, and that said defendant has received and accepted the same and has paid thereon the sum of four hundred dollars, or forty per cent. of said subscription, and no other further or different sum; that thereafter, to wit, on or about the day
39 of , A. D. 187 , said defendant did become the purchaser and legal owner of ten other shares of one hundred dollars each of the capital stock of said Great Western Insurance Company, upon which had been paid the sum of four hundred dollars, or forty per cent. thereof, and no other further or different sums, whereby the said defendant became and *and* ever since has been a stockholder in said Great Western Insurance Company, subject to all the rights, privileges, and profits ensuing to the stockholders thereof in proportion to the shares of stock held by him, and in like manner subject to all the burdens and liabilities of the stockholders in said company. Plaintiff shows that on the faith of said subscription for stock by said defendant and other subscriptions of like nature in pursuance of its increase of stock as aforesaid the said Great Western Insurance Company obtained faith and credit with the public, and was enabled to make contracts
40 for insurance, and to receive large sums for premiums upon risks assured and policies issued.

That in pursuance of the requirements of the statute of the State of Illinois in such cases made and provided the amount so unpaid of defendant's stock subscription, together with the unpaid subscription of all and the other stockholders in said Great Western Insurance Company, were, by the officers and agents of said Great Western Insurance Company, reported to the auditor of the State of Illinois, and said company otherwise made public and advertised the same as assets and available resources of said company, upon the faith of which statements so made to the public through said state department and otherwise, said company obtained public faith and credit, and was enabled to extend its business and procure contracts of insurance, and did receive premiums to a large amount for the use and benefit of its
41 said stockholders.

Plaintiff avers that afterwards, to wit, on the 3rd day of January, A. D. 1872, to wit, at Chicago, in the State of Illinois, in consequence of great losses which said insurance company had prior to that time sustained by fire in said city of Chicago aforesaid and elsewhere, its entire cash capital and assets were exhausted, and said company became liable to its policy-holders to an amount greatly exceeding all its cash funds and means of payment, and in an amount largely in excess of all sums that can be collected on its entire unpaid capital stock and assets, which said liabilities are still outstanding, due, and unpaid, and for the purpose of providing means of payment thereof the said insurance company, by a vote of its directors and stockholders duly convened for that purpose, to wit, on the day and year aforesaid, to wit, at Chicago, in the State of Illinois aforesaid, duly assessed,
42 called in, and *and* ordered paid, to wit, twenty per cent. on the then remaining unpaid eighty per cent. on each share of stock so held by its stockholders on said unpaid capital stock, of which the said stockholders then and thereafter had notice, and which said sum so assessed, called in, and ordered to be paid was so paid by said defend-

ant, and is a part of the payment hereinbefore averred as having been made by said defendant. Plaintiff avers that afterwards, in consequence of its losses so sustained as aforesaid and the delinquencies of its stockholder' in the payment of the calls so made upon them as aforesaid, the said Great Western Insurance Company became unable to meet its liabilities, and upon a petition filed in bankruptcy on the 17th day of January, 1872, by Richard M. Hooley against the said Great Western Insurance Company the said insurance company was afterwards, to wit, on the 6th day of February, A. D. 1872, adjudicated a bankrupt by
43 the district court of the United States for the northern district of Illinois, in pursuance of the act of Congress of the United States in such case made and provided, as by the records thereof, now remaining in said court, will more fully and at large appear. Plaintiff avers that on the 11th day of April, A. D. 1872, the said Clark W. Upton, plaintiff, was duly appointed assignee in bankruptcy of the estate of the said Great Western Insurance Company in conformity with law, and a deed of assignment of all the estate, effects, and property of the said Great Western Insurance Company, bankrupt as aforesaid, was executed in due form of law under the hand and seal of Homer N. Hibbard, esq., register in bankruptcy for the first Congressional district of the State of Illinois, and delivered to the said Clark W. Upton, so appointed assignee as aforesaid, thereby vesting in the said assignee the estate, property, and effects of the said bankrupt.
44 Plaintiff avers that the said district court of the United States, sitting in bankruptcy, in and for the northern district of Illinois, on the application and petition of the said Clark W. Upton, assignee of the estate of said bankrupt as aforesaid, to wit, on the 5th day of July, A. D. 1872, made and entered of record in said court a call upon the stockholders of said bankrupt for the full payment of the entire unpaid capital stock of the said bankrupt, severally held by them and each of them, and ordered the same paid as hereinafter set forth; which said call and order of payment was of the following letter and effect, to wit:

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, BANKRUPT. } In bankruptcy.

And now on this day comes C. W. Upton, assignee of the estate of said bankrupt, and makes application to this court showing
45 that a large amount of capital stock of the said bankrupt remains unpaid in part; that the whole amount of such capital stock will be required to be paid in order to meet the demands now due from and proved against the estate of said bankrupt, and upon the investigations of the facts in the matter, and the court being fully advised in the premises, it is ordered that the entire amount unpaid on the capital stock of the said bankrupt be paid to said assignee, on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois, and in default thereof, that said assignee proceed to collect the same. It is further ordered that notice of this call be given to the stockholders of said bankrupt, so far as known, without unreasonable delay, by publication or otherwise. And the plaintiff assignee, as
46 aforesaid, avers that notice in accordance with the terms and conditions of said order was duly given to the stockholders of said bankrupt as therein and thereby required. Plaintiff further avers that personal notice of said order has been heretofore duly given to said defendant, and demand made of payment of the amount due and

ordered to be paid as aforesaid, to wit, the sum of six hundred dollars, or sixty per cent. of the amount of stock subscribed by said defendant, and the further sum of six hundred dollars or sixty per cent. of the ten shares of stock, thereafter purchased and now owned by him as aforesaid, being in all the sum of twelve hundred dollars, and the said defendant has wholly refused to pay the said sum or any part thereof. Wherefore plaintiffs brings this suit and asks judgment against said defendant for said sum of twelve hundred dollars, with interest
47 at twelve per cent. from the 15th day of August, A. D. 1872, and for costs of suit.

E. P. JOHNSON,
Att'y for Pl'ff.

I hereby sign security for costs in this case.

C. W. RINER.

Approved this 19th day of February, A. D. 1877.

J. W. BRUNER,
Clerk Dis't Court.

Which said petition is endorsed on the back as follows, to wit: Doc. 2. No. 514. District court for the 1st judicial district. Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, vs. Thomas A. Kent. Petition. Filed April 8th, 1876. J. W. Bruner, clerk, by J. R. Whitehead, deputy clerk. E. P. Johnson, att'y for pl'ff.

And thereafter, to wit, on the 15th day of May, 1876, came the said defendant and filed his answer herein in the words and figures following, to wit:

TERRITORY OF WYOMING,
County of Laramie, ss:

48 In district court, first judicial district.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, pl'ff,
vs.
THOMAS A. KENT, DEF'T.

Answer.

The defendant in this action for answer to the petition of the plaintiff herein admits that the said Great Western Insurance Company is a body corporate heretofore created and existing under the laws of the State of Illinois.

This defendant further admits that he is a citizen of the Territory of Wyoming and a resident at the city of Cheyenne, in the county of Laramie, in said Territory, and that on or about the 1st day of January, A. D. 1871, he did enter into a contract of subscription and subscribed for ten shares of the capital stock of the said Great Western Insurance Company of one hundred dollars each.

49 And this defendant denies each and every allegation in the said petition made and contained which are not hereinbefore specifically admitted.

2. This defendant for a further defense to the cause of action set forth in said petition alleges as to the said ten shares of the capital stock of *of* said Great Western Insurance Company, alleged in said petition to have been subscribed for by this defendant on or about the first day of January, A. D. 1871, that he did not enter into a contract of subscription and subscriber for the same by any contract of the terms, import, or substance as alleged in said petition; but that this defendant on or about the first day of January, A. D. 1871, entered into a contract with the said Great Western Insurance Company for the said ten shares of its capital stock, which contract was in the words and figures following, that is to say:

"Know all men by these presents, that for and in consideration
50 of ten shares of the capital stock of the Great Western Insurance Company of Chicago, Ill's, received by me, I am held and firmly bound and agree to pay the Great Western Insurance Co. of Chicago the sum of two hundred dollars in installments as follows: Twenty-five per cent. thereof on receipt of stock certificate; twenty-five per cent. in three months from date hereof; twenty-five per cent. in six months from date hereof; twenty-five per cent. nine months from date, with interest 10 per cent. after due."

T. A. KENT.

(On margin:) Stock non-assessible.

Which was the only contract this defendant ever entered into in reference to the said ten shares of said stock.

And this defendant further alleges that at the time of entering into said contract hereinbefore set forth, he was a citizen and resident of the Territory of Wyoming, and was not then and never since has been a citizen or resident of the State of Illinois; and that the said Great Western Insurance Company for the purpose of inducing this defendant to enter into the said contract hereinbefore set forth, and in
51 consideration of defendant's entering into the said contract, did falsely and fraudulently represent, allege, state, and guarantee to the said defendant that the said ten shares of said capital stock which this defendant was to receive in consideration of his entering into said contract were, and forever should be, non-assessible after the defendant should have paid therefor the said sum of two hundred dollars; and that this defendant would not and never could be held liable for the payment on account of said ten shares of stock of any other or further sum than the said two hundred dollars.

And this defendant alleges that he believed said representations, allegations, statements and gua'ntees to be true and made in good faith, and that in consequence thereof he entered into the said contract hereinbefore set forth, and that but for said representation, statement, allegations and guarantee he would not have entered into the same;
52 that this defendant did not then know the laws of the State of Illinois or any of them, and then being a non-resident of said State of Illinois was not bound to know its laws or any of them; that in consequence of said representations, allegations and statements this defendant firmly believed that by the laws of the State of Illinois the said Great Western Insurance Company could lawfully issue said ten shares of its capital to this defendant, so that this defendant would be subject to no further or other liability thereon than the said two hundred dollars.

And this defendant further alleges as to the said ten shares of the

capital stock of the said Great Western Insurance Company, of which it is alleged in the petition herein that this defendant became the purchaser and legal owner on or about the day of , A. D. 187 , that the same were subscribed for by the firm of Joslin & Park, of Cheyenne, Wyoming Territory, upon a contract between them and said Great Western Insurance Company; that said last-mentioned
53 contract was entered into by the said Joslin & Park in consequence of the same false and fraudulent representations, statements, allegations, and guarantee made to them by said Great Western Insurance Company that were made to this defendant as hereinbefore stated; that said Joslin & Park, in subscribing for said shares of said stock, relied upon and believed that said representation, statements, allegations, and guarantee were true when they subscribed for said stock, and but for the same would not have subscribed therefor; that at that time the said firm of Joslin & Park were residents of Wyoming Territory, and were not then, and never since have been, residents of the State of Illinois; that when this defendant purchased said stock from said Joslin & Park he knew the manner, terms, and contract, the representations, allegations, statements, and guarantee aforesaid upon which the said Joslin & Park had subscribed for said stock, and
54 took and acquired the same subject, to the same rights upon which it was held by said Joslin & Park. And this defendant further alleges that before the first day of January, A. D. 1872, the full amounts due to said Great Western Insurance Company for all of the shares of stock aforesaid, according to the terms of the contract of subscription therefor, and the representations, statements, allegations, and guarantees aforesaid, were fully paid to said Great Western Insurance Company, and that the amounts so paid were received by said Great Western Insurance Company in full discharge and payment of the amount due on the respective subscription contracts therefor. Defendant further says that since the payments to said Great Western Insurance Company of the amount due upon said subscription contracts for the shares of stock aforesaid he did pay to said Great Western Insurance Company the sum of two hundred dollars upon the said
55 ten shares of stock subscribed for by him; and that since the same time the said Joslin & Park did also pay to said Great Western Insurance Company two hundred dollars upon the shares of stock subscribed for by them; but this defendant alleges that neither himself nor the said Joslin & Park paid said last-named sums in consequence of any assessments and *and* calls made upon said shares of stock or in consequence of the said contracts of subscription therefor; but said last-named sums of money were paid to said Great Western Insurance Company solely as gratuities and in consequence of the false and fraudulent representations of said Great Western Insurance Company made to this defendant and the said Joslin & Park that the payment of said amounts would relieve the said corporation from all embarrassment under which it labored in consequence of the said disastrous fire in the city of Chicago, referred to in the petition herein,
56 and would render the stock of said corporation as valuable as it was before the time of said fire, which representations were false and fraudulent to the knowledge of said corporation when made, but were honestly and relied upon by this defendant and said Joslin & Parks, and said last-named payments would not have been made but for said false and fraudulent representations.

3. For a cause of action and offset to said plaintiff's cause of action this defendant alleges that the said Great Western Insurance Company

before it was adjudged bankrupt was indebted to this defendant in the sum of two thousand six hundred sixty-six & $\frac{66}{100}$ dollars upon an account for work and labor and service of the said defendant performed for the said Great Western Insurance Company at its request, and for moneys of the said defendant had and received by said Great Western Insurance Company at its request from the first day of
57 October, A. D. 1870, to the first day of February, A. D. 1873, a more particular account of which is hereunto annexed marked Exhibit A and made a part of this answer; and that the said sum of two thousand six hundred sixty-six & $\frac{66}{100}$ dollars became due to this defendant from said Great Western Insurance Company on the first day of February, A. D. 1873; but no part thereof has been paid; wherefore this defendant prays judgment against said plaintiff for the said sum of two thousand six hundred sixty-six & $\frac{66}{100}$ dollars, with legal interest thereon since February first, A. D. 1873, and for the costs of this action.

W. W. CORLETT,
Attorney for Defendant.

EXHIBIT A.

Great Western Insurance Company to T. A. Kent, Dr.

To services rendered in the H. A. Pierce lease	200 00
58 Office rent from May 20, 1871, to Aug. 15, 1872, @ $50.00 per month	741 66
Sale of $42,500.00 capital stock, @ 3 per cent	1,275 00
For serving notice of assessments of 20 per cent. on stockholders, and making collections	50 00
	$2,266 66
To money had and received to my use	400 00
	$2,666 66

Which said answer is endorsed on back as follows, to wit: Doc. 2, No 514, district court for 1st judicial district. Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Co., vs. T. A. Kent. Answer filed May 15th, 1876. J. W. Bruner, clerk. W. W. Corlett, att'y for def't.

And thereafter, on the 30th day of May, 1876, the plaintiff filed a demurrer to defendant's answer, in the words and figures following, to wit:

In the district court of first district in and for Laramie County.

CLARK W. UPTON, ASSIGNEE, &C.,
vs.
T. A. KENT, DEFENDANT.

59 Now comes plaintiff above named and demurs to the second and *and* third defenses set up in the answer of defendant above named, and for cause thereof says the same do not set up facts sufficient to constitute a defense to plaintiff's petition or cause of action, nor do they set up facts sufficient to constitute a counter-claim, set-off, or cause of action in favor of defendant and against this plaintiff.

E. P. JOHNSON,
Att'y for Pl'ff.

Which said demurrer is endorsed on the back as follows, to wit: Doc. 2, No. 514. Clark W. Upton vs. T. A. Kent. Demurrer filed May 30th, 1876. J. W. Bruner, clerk. E. P. Johnson, att'y for pl'ff. Demurrer to answer.

And afterwards, to wit, on the 24th day of June, A. D. 1876, it being one of the regular days of the May, A. D. 1876, term of said court, the following order of court was entered of record in said court on the foregoing demurrer, in the words and figures following, to wit:

Order overruling demurrer.

May term, 1876, Saturday, June 24, 1876.

CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Ins. Co., bankrupt,
vs.
THOMAS A. KENT. } No. 514.

60 Now comes the plaintiff in this action, by E. P. Johnson, his attorney, and the said defendant, by W. W. Corlett, esq., his attorney, and the court having had the argument of said counsel on the demurrer of the plaintiff to the second and third defenses in said plaintiff's answer under consideration, and being now well advised in the premises, overrules said demurrer; to which ruling of the court said plaintiff, by his counsel, excepts.

And thereafter, to wit, on July 1st, 1876, the plaintiff herein filed in said court a demurrer to the 3rd defense of defendant's answer, in the words and figures following, to wit:

Demurrer to 3rd defense of answer.

In the district court of the 1st district in and for Laramie.

CLARK W. UPTON, ASSIGNEE, &C.,
vs.
THOMAS A. KENT, DEF'T.

61 And now comes the plaintiff herein and demurs to the 3rd defense set up in defendant's answer, & for cause thereof says that the facts therein stated do not constitute a defense, counter-claim, set-off or cause of action in favor of defendants and against this plaintiff, in this cause.

E. P. JOHNSON,
Att'y for Pl'ff.

Which said demurrer is endorsed on the back as follows, to wit: Doc. 2, 514. Clark W. Upton, assignee, vs. Thomas A. Kent. Demurrer to 3' defense of the answer. Filed July 1st, 1876. J. W. Bruner, clerk. E. P. Johnson, att'y for pl'ff.

And afterwards, to wit, on the 6th day of December, A. D. 1876, it being one of the regular days of the November, A. D. 1876, term of said court, the following proceedings were had in said court, in the words and figures following, to wit:

Journal entry.

November term, 1876, Wednesday, December 6th, 1876.

CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Company,
vs.
62 THOMAS A. KENT. } No. 514.

Comes now the parties to this suit, by their respective attorneys, to wit, E. P. Johnson for plaintiff, and Messrs. W. W. Corlett, Daniel McLaughlin, and T. J. Street for defendant, and all parties being ready for trial, thereupon comes a jury in this case, composed of the following persons, to wit, J. R. Apperson, John Geer, A. Simmons, James Ferris, John A. Apperson, J. L. Gould, J. H. Snell, Edward Ruthom, Rudolph Wenger, W. R. Weightman, A. D. Shakepeare, and T. D. Anthony, twelve good and lawful men from the body of Laramie County, who were then and there tried, accepted, empanneled and sworn to try the issues herein joined; and thereupon this case is now opened by the statement of counsel to the jury, which the attorney for plaintiff objected to the counsel for the defendant making any statement in regard to the third ground of defense set up in defendant's answer, on
63 the ground that said defense had been demurred to, and that said demurrer had been sustained, and thereupon ensued some discussion in regard to said demurrer, and it appearing that no demurrer to said 3rd defense had ever been passed upon, although the same was filed, the court announced that it would now be considered by the court; that no demurrer had ever been filed, and that the case would be treated accordingly. And thereupon the attorney for plaintiff now applies to the court by a written motion for leave to file a replication to the 3rd defense set up in defendant's answer, which motion is now argued by counsel; and the court being fully advised in the premises, the said motion is sustained by the court; to which ruling of the court on said motion the defendant, by his said counsel, excepts; and thereupon defendant files a motion for a non-suit against plaintiff in this case,
64 on the ground that the jury were not sworn to try the issues in this case, as now made up, and could not be resworn; which said motion is argued by counsel and overruled by the court; to which said ruling the defendant, by his counsel aforesaid, excepts. And thereupon the said defendant now moves for a continuance of this cause, on the grounds stated in said motion, which was reduced to writing and placed on file, and the same is now argued by counsel; after which the court, being fully advised in the premises, overruled said motion; to which ruling of the court the said defendant, by his said counsel, excepts. And thereupon the taking of the testimony in this case is now proceeded with, and this case being still on trial when the hour for adjournment arrived, by consent of parties, the jury herein are permitted to separate until the convening of the court to-morrow morning.

65 And now on said 6th day of December, A. D. 1876, there was filed in said court in the cause aforesaid a replication, the filing of which was to date as of the 24th day of June, A. D. 1876, which replication was in the words and figures following, to wit:

Reply.

In the district court of the 1st district in and for Laramie County.

CLARK W. UPTON, ASSIGNEE, &C.,
vs.
THOMAS W. KENT, DEF'T.

Now comes the plaintiff, and for reply to the 3d defense of defendant's answer, constituting his set-off and cause of action, denies each and every allegation therein contained.

E. P. JOHNSON,
Att'y for Pl'ff.

Which said replication is endorsed on the back as follows, to wit: 514. C. W. Upton vs. Thos. A. Kent. Replication. Filed June 24th, 1876, by leave of court. J. W. Bruner, clerk. E. P. Johnson, att'y for pl'ff.

66 And thereafter on the 14th day of April, 1877, being one of the regular days of said term of court, the defendant filed his bill of exceptions, in the words and figures following, to wit:

TERRITORY OF WYOMING,
County of Laramie, ss:

In district court, first judicial district.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, plaintiff,
vs.
THOMAS A. KENT, DEFENDANT.

Bill of exceptions.

Be it remembered that this cause came on for trial upon the pleadings of the parties therein on the sixth day of December, A. D. 1876, being one of the regular trial days of the November, A. D. 1876, term of said district court, before the Hon. J. W. Fisher, presiding judge of *of* said court, and a jury was empanneled and sworn.
67 The plaintiff, by his attorney, then filed the following *the following* motion for leave to file *re*-replication, in words and figures as follows, to wit: Now comes the plaintiff and moves the court for leave to file a replication as of the date of May 30th, 1876, to the 3d defense of defendant's answer, constituting the set-off and cause of action by defendant against plaintiff for reason given in affidavit in support hereof.

E. P. JOHNSON, *Att'y, &c.*

The plaintiff, by his attorney, also filed an affidavit in support of motion for leave to file replication, in words and figures as follows, to wit: E. P. Johnson, being duly sworn, deposes and says he is attorney for plaintiff in this cause that he now makes application for leave 3d defense, a replication to the 3' defense of defendant's answer constituting his cause of action and counter-claim and set-off for the reason

68 that affiant did file on the 1st day of July, 1876, a demurrer to said portion of the answer and supposed the same had been sustained with another to the same effect in another case; that he consented to go to a trial of the under the full belief that said demurrer had been sustained and the said defense practi'ally stricken from the answer, and therefore needing no replication. That affiant still does believe such action has been taken, notwithstanding it does not appear of record. That he makes this application now to prevent the wrong and injury that would inure to plaintiff by reason of the action of the court in refusing to recognize the demurrer or take any action therein, and makes these statements to show that he was deceived as to facts concerning action on the demurrer, and that there has been no negligence or want of prompt action on his part or that of the plaintiff.

E. P. JOHNSON,
Attorney, &c.

69 Sworn to and subscribed before me this 6th day of December, 1876.

J. W. BRUNER,
Clerk Dist. Court.

The court allows the replication to be filed, to which the defendant objects. Objection overruled, to which defendant excepts. The defendant thereupon filed a motion for a non-suit, in words and figures as follows, to wit: Now comes the defendant, by his attorneys, and moves the court to order this action non-su'ted, for the following good and sufficient reasons:

1st. Because the jury empannelled and sworn in this was so empannelled and sworn to try the issues by the petition and the answer thereto.

2. Because said jury was not sworn to try the issues raised by the reply to the answer, and have no right under their oaths to pass upon the issues now raised by the plaintiff's reply,

CORLETT STREET AND
McLAUGHLIN,
Att'ys for Defendant.

70 The court denied the motion for a non-suit, to which the defendant excepts.

The defendant thereupon files a motion for a continuance, in words and figures as follows, to wit:

Now comes the said defendant and moves the court to continue this case until the next term, because the issues in this case since the empanelling of the jury has been changed, requiring evidence on the part of the defendant to maintain the issues in his third defense in his answer, now raised by the replication to said third defense, and which he was not required to maintain before said replication was filed, said replication having been filed since the jury was sworn and empanneled.

CORLETT, STREET AND
McLAUGHLIN,
Att'ys for Defendant.

Court overruled the motion for a continuance, to which the defendant excepts.

71 The plaintiff to maintain the issues on his part offers in evidence the first thirty-two sections of chapter seventy-three of the Revised Statutes of the State of Illinois for the year 1874.

(The defendant objects to their being admitted in evidence, on the ground that the law offered is not properly proved and does not purport to have been published by authority of the State of Illinois.)

The plaintiff having been sworn testified as follows:

I reside in Illinois, and have resided there for the period of 7 years; I am a lawyer; I am acquainted with the compilation of laws of Illinois, and know that this volume is used in the courts of Illinois.

(The court thereupon admits the law in evidence, to which the defendant objects; objection overruled, to which defendant excepts.)

The plaintiff read the law as follows:

CHAPTER 73.—*Insurance—Fire, Marine and Inland Navigation.*

1st. Be it enacted by the people of the State of Illinois repre-
72 sented in the general assembly, that any number of persons not less than thirteen may associate and form an incorporated
Laws of Illinois. company for the following purpose, to wit: To make insurance on dwelling-houses, stores, and all kinds of buildings, and upon household furniture and other property against loss or damage by fire and the risks of inland navigation and transportation. Any and all insurance companies hereafter incorporated under the provisions of this act, which shall, in the declaration and charter provided to be filed, have expressed an intention to make insurance, or which shall have power to make insurance against loss or damage by the risks of inland navigation or transportation, shall have power to make insurance upon vessels, boats, cargoes, goods, merchandise, freights, and other property against loss and damage by all or any of the risks of lake, river, canal, and inland navigation and transportation.

2. *May reinsure.*—Any companies organized under this act
73 shall have power to effect reinsurance of any risks taken by them respectively.

3. *Declaration.—Copy of charter.*—Such persons shall file in the office of the auditor of public accounts a declaration signed by all the corporators expressing their attention to form a company for the purpose of transacting the business of insurance, as expressed in the first section of this act, which declaration shall also comprise a copy of the charter proposed to be adopted by them, and shall publish a notice of such, their intention, once in each week for at least four weeks in a public newspaper, in the county in which such insurance company is proposed to be located.

4. *Form of charter.*—The charter comprised in such declaration shall set forth the name of the company, the place where the principal office for the transaction of its business shall be located, the mode and manner in which the corporate powers granted by this act are to be ex-
74 ercised, the mode and manner of electing trustees or directors, a majority of whom shall be citizens of this State, and of filling vacancies (but each director of a stock company shall be the owner in his own right of at least $500 worth of the stock of such company at its par value), the period for commencement and termination of its fiscal year and the amount to be employed in the transaction of its business, and the auditor of public accounts shall have the right to reject any

name or title of any company applied for, when he shall deem the name too similar to one already appropriated or likely to mislead the public in any respect.

5. *Restriction.*—No company formed under this act shall directly or indirectly deal or trade in buying or selling any goods, wares, merchandise, or other commodities whatever, excepting such articles as may have been insured by such company and are claimed to be
75 damaged by fire or water.

6. *Capital of joint stock companies.*—No joint stock company shall be incorporated under this act in the city of Chicago, nor shall any company incorporated under this act establish any agency for the transaction of business in said city with a smaller capital than $150,000 actually paid in in cash, nor in any other county in this State with a smaller capital than $100,000 actually paid in in cash.

Capital of mutual companies.—Nor shall any company formed under this act for the purpose of doing the business of fire or inland navigation insurance, on the plan of mutual insurance, commence business, if located in the city of Chicago, nor establish any agency for the transaction of business *of* said city until agreements have been entered into for insurance with at least 400 applicants, the pre-
76 miums on which shall amount to not less than $200,000, of which $40,000 at least shall have been paid in cash, and notes of solvent parties, founded on actual and bona fide applications for insurance, shall have been received for the remainder; nor shall any mutual insurance company in any other part of the State commence business until agreements have been entered for insurance with at least 200 applicants, the premiums on which shall amount to not less than $100,000, of which at least $20,000 shall have been paid in cash, and notes of solvent parties, founded on actual and bona-fide applications for insurance, shall have been received for the remainder. No one of the notes received as aforesaid shall amount to more than $500, and no two shall be given for the same risk, or be made by the same person or firm, except where the whole amount of such notes shall not exceed $500, nor shall any
77 such note be represented as capital stock, unless a policy be issued upon the same within thirty days after the organization of the company, upon a risk which shall not be for a shorter period than twelve months. Each of said notes shall be payable in part or in whole at any time when the directors shall deem the same requisite for the payment of losses by fire or inland navigation, and such incidental expen'es as may be necessary for transacting the business of said company, and no note shall be accepted as part of such capital stock unless the same shall be accompanied by a certificate of a justice of the peace or supervisor of the town or city where the person making such note shall reside that the person making the same is in his opinion pecuniarily good and responsible for the same, and no note shall be surrendered during the life of the policy for which it was given.

78 *Risks of joint stock companies.*—No joint stock fire insurance company organized under this act, or transacting business in this State, shall expose itself to any loss or any one fire or inland navigation risk or hazard to amount exceeding ten per cent. of its paid up capital.

7. *Opening books of joint stock and mutual companies.*—It shall and may be lawful for the individuals associated for the purpose of organizing any company under this act, after having published the notice and filed the declaration and charter as required by the third section of this act, and also on filing in the office of the auditor of public accounts

proof of such publication by the affidavit of the publisher of such newspaper, his foreman or clerk, to open books for subscription to the capital stock of the company so intended to be organized, and
79 to keep the same open until the full amount specified in the charter is subscribed; or in case the business of such company is proposed to be conducted on the plan of mutual insurance, then to open books to receive propositions, and to enter into agreements in the manner and to the extent specified in the sixth section of this act.

8. *Investment of capital.*—It shall be lawful for any insurance company organized under this act, or any such company incorporated under any law of this State, to invest its capital and the funds accumulated in the course of its business or any part thereof in bonds and mortgages or improved unincumbered real estate within the State of Illinois, worth fifty per cent. more than the sum loaned thereon (exclusive of buildings), unless such buildings are insured and the policy transferred
80 to said company, and also in the stocks of this State or stocks or Treasury notes of the United States, and also in the banks, stocks of national banks, and in the stocks and bonds of any county or incorporated city in this State, authorized to be issued by the legislature, and to lend the same or any part thereof on the security of such stocks, or bonds, or Treasury notes, or upon mortgages as aforesaid, and to change and reinvest the same as occasion may from time to time require; but any surplus money over and above the capital stock of such fire and inland navigation insurance companies, or any such insurance companies incorporated under any law of this State, may be invested in or loaned upon the pledge of the public stocks or bonds of the United States, or any one of the States, or the stocks, bonds, or other evidence of indebtedness of any solvent dividend-paying institution incorporated under the laws of this State or of the United States, except their own stock; provided, always, that the current market value of
81 such stocks, bonds, and other evidence of indebtedness shall be at all times during the continuance of such loans at least ten per cent. more than the sum loaned thereon.

9. *What real estate company may hold in sale.*—No company organized by or under this act shall purchase, hold, or convey real estate excepting for the purpose and in the manner herein set forth, to wit: First, such as shall be requisite for its convenient accommodation in the transaction of its business; or, second, such as shall have been mortgaged to it in good faith by way of security for loans previously contracted, or for money due; or, third, such as shall have been conveyed to it in satisfaction of debts previously contracted in their legitimate business or for money due; or, fourth, such as shall have been purchased at sales upon judgments, decrees, or mortgages obtained or made for such debts, and it shall not be lawful for any such company to purchase,
82 hold, or convey real estate in any other case or for any other purpose; and all such real estate as may be acquired as aforesaid, and which shall not be necessary for the accommodation of such company in the transaction of its business, shall be sold and disposed of within five years after such company shall have acquired title thereto, unless the company shall procure a certificate from the auditor of public accounts that the interests of the company will suffer materially by a forced sale thereof; in which event the sale may be postponed for such a period as the said auditor shall direct in said certificate, and the said auditor may also give such certificate, and extend the time for holding real estate in the like circumstances in the application of any insurance company heretofore incorporated.

10. *Charter, ect., examined by attorney-general.—Capital by auditor.—Certificate filed.—Commence business.—Evidence.*—The charter and proof of publication herein required to be filed by every such company shall be examined by the auditor-general, and if found conformable to this act and not inconsistent with the constitution or laws of this State shall be certified by him to the auditor of public accounts, who shall thereupon cause an examination to be made either by himself or by three disinterested persons specially appointed by him for that purpose, who shall certify under oath that the capital herein required of the company named in the charter, according to the nature of the business proposed to be transacted by such company, has been paid in and is possessed by it in money or in such stocks and bonds and mortgages as are required by the eighth section of this act, or, if a mutual company, that it has received and is in actual possession of the capital premiums or bona fide engagements of insurance or other securities, as the case may be, to the full extent and of the value required by the sixth section of this act, and the name and the residence of the maker of each premium note forming part of the capital and the amount of such note shall be returned to the said auditor, and the corporators and officers of such company shall be required to certify under oath that the capital exhibited to those persons is bona fide property of the company; such certificate shall be filed in the office of the said auditor, who shall thereupon deliver to such company a certified copy of the charter and of said certificates, which, on being filed in the office of the clerk of the county where the company is to be located, shall be their authority to commence business and issue policies; and such certified copy of the charter and of said certificates may be used for or against said company with the same effect with the original, and shall be conclusive evidence of the fact of the orga'ization of such company.

11. *By-laws.—Seal.*—The corporators or the trustees or directors, as the case may be, of any company organized under this act shall have power to make such laws not inconsistent with the constitution or laws of this State as may be deemed necessary for the government of its officers and the conduct of its affairs, and the same, when necessary, to alter and amend, and they and their successors may have a common seal, and may change and alter the name at their pleasure.

12. *Dividends.—"Year" defined.*—It shall not be lawful for the directors, trustees, or managers of any such insurance company to make any dividend except from the surplus profits arising from their business, and in estimating such profits there shall be reserved therefrom a sum equal to the whole amount of unearned premiums on unexpired risks and policies, and also there shall be reserved all sums due the corporation on bonds and mortgages, stocks, and book accounts of which no part of the principal or interest thereon has been paid during the last year and for foreclosure, or suit has not been commenced for collection, or which, after judgment obtained thereon, shall have remained more than two years unsatisfied, and on which interest shall not have been paid; and also there shall have been reserved all interest due or accrued and remaining unpaid; provided, always, that any company may declare dividends not exceeding ten per cent. on its capital stock in any one year that shall have accumulated, and be in possession of a fund in addition to the amount of its capital stock and of such dividend, and all actual outstanding liabilities equal to one-half of the amount of all premiums or risks not terminated at the time of making such dividend. Any dividend made

contrary to these provisions shall subject the company making
87 the same to a forfeiture of its charter, and each stockholder receiving it to a liability to the creditors of such company to the extent of the dividend received, in addition to the other penalties and punishments in such case made and provided.

This section shall not apply to the declaration of scrip dividends by participating companies. But no such scrip dividend shall be paid except from surplus profits after reserving all sums as above provided, including the whole amount of premiums on unexpired risks. The word "year," wherever used in this section, shall be construed to mean the calendar year.

13. *Mutual companies.—Notes.—Members.—Assessments.—Liability.*—All notes deposited with any mutual insurance company at the time of its organization, as provided in section 6, shall remain as security for all losses and claims, until the accumulation of the profits invested as required by the eighth section of this act shall equal the amount
88 of cash capital required to be possessed by stock companies organized under this act, the liability of each note decreasing proportionately as the profits are accumulated; but any note which may have been deposited with any such mutual insurance company subsequent to its organization, in addition to the cash premium, or any insurance effected with such company, may, at the expiration of the time of such insurance, be relinquished, and given up to the maker thereof, or his representative, upon his paying his proportion of all losses and expenses which may have accrued thereon during such term. The directors or trustees of any such company shall have the right to determine the amount of the note to be given in addition to the cash premium by any person insured in such company, but in no case shall the note be more than five times the whole amount of the cash premium; and every person effecting insurance in any mutual company organized under this act, and also their heirs, executors, administrators
89 and assigns, continuing to be so insured, shall thereby become members of said corporation during the period of insurance, and shall be bound to pay for losses and such necessary expenses as aforesaid, accruing in and to said company, in proportion to the amount of his deposit note or notes. The directors shall, as often as they deem necessary, after receiving notice of any loss or damage by fire sustained by any member, and ascertaining the same, or after the rendition of any judgment against said company for loss or damage, settle and determine the sums to be paid by the several members thereof as their respective portions of such loss, and publish the same in such manner as they shall see fit, or as the by-laws shall have prescribed, and the same (sum) to be paid by each member shall always be in proportion to the original amount of his deposit note or notes, and shall be paid to the officers of the company within thirty days next after the publi-
90 cation of said notice and if any member shall, for the space of thirty days next after the publication of said notice, and service of such notice upon such member by mail, directed to him at his post-office-address, as written in or upon his application for insurance, neglect or refuse to pay the sum assessed upon him as his proportion of any loss as aforesaid, in such case the directors may sue for and recover the whole amount of his deposit note or notes, with costs of suit; but execution shall only issue for assessments and costs as they accrue. If the whole amount of the deposit notes shall be insufficient to pay the loss occasioned by any fire or fires, in such case the sufferers insured by the said company shall receive toward making good their respective

losses a proportional share of the whole amount of said notes, according to the sums by them respectively insured; but no member
91 shall ever be required to pay for any loss occasioned by fire in inland navigation more than the whole amount of his deposit note.

14. *Mutual or joint stock indicated on policy, etc.*—Every fire and inland navigation insurance company hereafter organized, if it be a mutual company, (shall) embody the words mutual in its title, which shall appear on the first page of every policy and renewal receipt; and every company doing business as a joint stock company shall, upon the face of its policy, in some suitable manner express that such policy is a stock policy.

15. *Suits.*—Suits of law may be maintained by any corporation formed under this act against any of its members or stockholders for any cause relating to the business of such corporation; also suits at law may be prosecuted and maintained by any member or stockholder
92 against such corporation for any losses which may have accrued if judgment is withheld after such losses may have become due.

16. *Liability of corporators, etc.—Notes.*—The trustees and corporators of any company organized under this [act] shall be severally liable for all debts or responsibilities of such company, to the amount by him or them subscribed, until the whole amount of the capital of such company shall have been paid in and a certificate thereof recorded as hereinbefore provided. Notes taken in advance of premiums under this act are not to be considered debts of the company in determining whether a company is insolvent, but are to be regarded as assets of the company.

17. *Joint stock companies may extend charter.*—Any existing joint stock fire insurance company heretofore incorporated under the laws
93 of this State, and any company organized under this act having a capital of at least $100,000, may without increasing its capital at any time within two years previous to the termination of its charter, after giving notice, at least once a week for four weeks successively in a newspaper published in the county where such company is located, of such intention and with a declaration under its corporate seal, signed by the president and two-thirds of its directors of their desire for such extension, extend the term of its original charter to the time specified in the twenty-sixth section of this act by altering and amending the same so as to accord with the provisions of this act, and filing a copy of such amended charter with the declaration aforesaid in the office of the auditor of public accounts, whereupon the same proceedings shall
94 be had as are required in the tenth section of this act—mutual may become joint stock company.

And any mutual insurance company heretofore incorporated or organized under any of the laws of this State having surplus assets aside from premiums and stock notes sufficient to reinsure all its outstanding risks, after having given notice once a week for four weeks of their intention and of the meeting hereafter provided for, in a newspaper published in the county where such company is located, may with the consent of two-thirds of the corporators or members present at any regular annual meeting, or at any special meeting duly called for the purpose, or with the consent in writing of two-thirds of the corporators or members of such company, and the consent also of three-fourths of the trustees or directors, unless otherwise provided in the charter become a joint stock company by conforming its charter to and otherwise pro-
95 ceeding in accordance with this act; and every member of such

company on the day of said annual or special meeting or the date of said written consent shall be entitled to priority in subscribing to the capital stock of said company, for one month after the opening of the books of subscription to such capital stock, in proportion to the amount of cash premiums paid in by such members on unexpired risks in force on the day of said annual or special meeting or the date of said written consent; and every company so extended or changed shall come under the provisions of this act in the same manner as if it had been incorporated originally under this act.

18. *Increase of capital stock.*—Any existing fire insurance company and any company formed under this law may at any time increase the amount of its capital stock after notice given once a week for four weeks in any newspaper published in the county where such company
96 is located of such intentions, with the written consent of three-fourths in amount of its stockholders, unless otherwise provided in its charter; or, if a mutual company, with the unanimous consent of its trustees, unless otherwise provided in its charter, by altering or amending their charter in this respect, and filing a copy of their charter so amended, together with a de'laration under its corporate seal signed by its president and directors of their desire so to do, with such written consent of three-fourths in amount of its stockholders or the unanimous consent of the trustees as aforesaid to such increase, in the office of the auditor of public accounts, and upon the same proceeding had as are required by the tenth section of this act. (See "Corporators," ch. 32, §§ 50–58.)

19. *Companies heretofore formed subject to this act.*—All insurance companies hereto' formed in the State of Illinois, and now doing busi-
97 ness in this State, are hereby brought under all the provisions of this act, except that their capital may continue of the amounts and character named in and authorized by their respective characters during the existing term of such charter; and the investments of the capital and assetts of companies may remain the same as prescribed by their charters, anything in this act to the contrary notwithstanding, and such companies shall also be entitled to all the privileges and powers granted by said charters.

20. *Bodies corporate or politic.*—All companies incorporated or extended under this act shall be deemed and taken to be bodies corporate and politic in fact and in name, and shall be subject to all the provisions of law in relation to corporations so far as the same are applicable.

21. *Annual report to auditor.*—It shall be the duty of the president or vice-president and secretary of each company organized under this act or incorporated under any law of this State annually on the first
98 day of January of each year, or within one month thereafter, to prepare under their oath and deposit in the office of the auditor of public accounts a statement of the conditions of such company on the thirty-first day of December then next preceding, exhibiting the following facts and items in the following form, namely: 1st. The amount of capital stock of the company actually paid in. 2nd. The property or assets held by the company specifying—

1st. The value or nearly as may be of the real estate held by such company.

2d. The amount of cash on hand and deposited in banks to the credit of the company specifying in what banks deposited.

3d. The amount of cash in the hands of agents and in course of transmission.

4th. The amount of loans secured by mortgages and bonds constitut-

ing the first lien on real estate on which there shall be less than one year's interest due or owing.

5th. The amount of loans on which interest shall not have been
99 paid within one year previous to such statement.

6th. The amount due the company on which judgments have been obtained.

7th. The amount of stocks of this State, of the United States, of any incorporated city of this State, and of any other stocks owned by the company, specifying the amounts, number of shares, and "par" and marke' value of each kind of stock.

8th. The amount of stocks held thereby as collateral security for loans, with the amount loaned on each kind of stocks, its "par" value, and the market value.

9th. The amount of assessments on stock or premium notes, paid and unpaid, specifying each.

10th. The amount of interest actually due and unpaid.

11th. The amount of premium notes on hand on which policies are issued.

12th. The amount of installment notes on hand on which policies are issued.

Third. The liabilities of such company, specifying—

100 1st. The amount of losses due and *and* yet unpaid.

2nd. The amount of claims for losses resisted by the company.

3rd. The amount of losses incurred during the year, including those claimed and not yet due, and including the probably amount of those reported to the company upon which no action has been taken.

4th. The amount of dividends declared and due and remaining unpaid.

5th. The amount of dividends, if any, declared and not yet due.

6th. The amount of money borrowed and security, if any, given for the payment thereof.

7th. All other existing claims against the company, and also the gross amount of outstanding risks, and the gross amount of premiums thereon unearned.

Fourth. The income of the company during the preceding year, specifying—

1st. The amount of cash premiums received.

2d. The amount of notes received per premiums.

3d. The amount of interest money received.

4th. The amount of income received from other sources.

101 Fifth. The expenditure during the preceding year, specifying—

1st. The amount of losses paid during the year, stating how much of the same accrued prior, and how much subsequent, to the date of the preceding statements, and the amount at which such losses were estimated in such preceding statement.

2d. The amount of dividends paid during the year.

3rd. The amount of expenses paid during the year, including commissions and fees to agents and officers of the company.

4th. The amount paid in taxes, specifying the amount in this State.

5th. The amount of all other payments and expenditure.

It shall be the duty of the auditor to establish a classification of risks into any number of classes not less than four, according to the degree of hazard of such risks, and the auditor shall require said companies, as a part of the aforementioned statement, to give the *mem-*
102 bers of policies in force covering property embraced in each of

said classes, and the aggregate amount at risk upon property in each class.

Inquiries by auditor.—Replies.—The auditor of public accounts is hereby authorized and empowered to address any inquiries to any insurance company, or the secretary thereof, in relation to its doings or condition, or any other matter connected with its transactions, and it shall be the duty of any company so addressed to promptly reply in writing to any such inquiries.

Report concerning original notes.—Repeal.—The statement of any company, the capital of which is composed in whole or in part of notes, shall, in addition to the foregoing, exhibit the amount of notes originally forming the capital, and also what proportion of said notes is still held by such company and considered capital. The statements herein provided for shall be in lieu of any and all statements now required
103 by any existing law, and the several provisions of the acts approved February 14, 1855, and January 22d, 1857, are hereby repealed.

Penalty for not making report.—Every insurance company organized under any law of this State, failing to make and deposit such statements, or to reply to any inquiry of the said auditor, shall be subject to the penalty of $500, and an additional $500 for ever month that such company shall continue thereafter to transact any business of insurance.

Auditor to furnish form of report.—It shall be the duty of the auditor of public accounts to cause to be prepared and furnished to each of the companies, and to the attorneys of companies incorporated by other States and foreign governments, printed forms of the statements required by this act, and he may from time to time make such changes in the form of such statements as shall seem to him best adapted to elicit from the companies a true exhibit of their condition in respect
104 to the several points hereinbefore mentioned. It shall be the duty of the auditor of public accounts to cause the information contained in the statements required by this section to be arranged in a tabular form and printed in his biennial report.

22. *foreign companies agent.—Service of process.*—It shall not be lawful for any insurance company, association or partnership incorporated by or organized under the laws of any other State of the United States or any foreign government for any of the purposes specified in this act, direct or indirectly, to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act, and any such company desiring to transact any such business as aforesaid by any agent or agents in the State shall first appoint an attorney in this State, on whom process of law can be served, and file in the of-
105 fice of auditor of public accounts a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted; and any process issued by any court of record in this State, and served upon such attorney by the proper officer of the county in which such attorney may reside or may be found, shall be deemed a sufficient service of process upon such company, but service of process upon such company may also be made in any other manner provided by law.

Service after company stops business.—In case any insurance company not incorporated in this State shall cease to transact business in this State according to the laws thereof the agents last designated or acting as such for such corporation shall be deemed to continue agents for

such corporation, for the purpose of serving process for commencing action upon any policy or liability issued or contracted while
106 such corporation transacted business in this State, and service of such process for the causes aforesaid upon any such agent shall be deemed a valid personal service upon such corporation.

Copy of charter, etc., filed with auditor.—And every such company, association or partnership shall also file a certified copy of their charter or deed of settlement, together with a statement under the oath of the president or vice-president, or other chief officer, secretary of the company, for which he or they may act, stating the name of the company and place where located, the amount of its capital, with a detailed statement of its assets, showing the amount of cash on hand, in banks or in the hands of agents, the amount of real estate, and how much the same encumbered by mortgage, the number of shares of stock of every kind *of every kind* owned by the company, the par and market value of the same, amount loaned on bond and mortgage, the amount loaned, or other security, stating the kind
107 and the amount loaned on each, and the estimated value of the whole amount of such securities, any other assets or property of the company; also stating the indebtedness of the company, the amount of losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted by the company as illegal and fraudulent, and all other claims existing against the company; also a copy of the last annual report, if any, made under any law of the State by which such company was incorporated, and no agent shall be allowed to transact business for any such company whose capital is impaired to the extent of twenty per cent. thereof while such deficiency shall continue.

Deposit.—And any company incorporated by or organized under any foreign government shall, in addition to the foregoing, deposit with the auditor of public accounts, for the benefit and security of
108 policy holders residing in the United States, a sum not less than $200,000, in stock of the United States or of the State of Illinois, in all cases to be equal to a stock producing six per cent. per annum; said stocks not to be received by said auditor at a rate above their par value, or above their current market value, or in bonds and mortgages or improved unincumbered real estate in the State of Illinois, worth fifty per cent. more than the amount loaned thereon. (Sec. 33 & 34.)

Exchange of securities.—The stocks and securities so deposited may be exchanged from time to time for other securities receivable as aforesaid.

Interest fees.—And so long as the company so depositing shall continue solvent and comply with the laws of this State such company or association may be permitted by the said auditor to collect the interest or dividends on said deposits, and where a deposit is made
109 of bonds and mortgages accompanied by full abstracts of titles and searches the fees for an examination of title by counsel, to be paid by the party making the deposit, shall not exceed $20 for each mortgage, and the fee for an appraisal of property shall be $5, to each appraisal not exceeding two, besides expenses for each mortagge.

Compliance with this act necessary.—Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire or inland navigation insurance in this State without procuring from the auditor of public accounts a certificate of authority stating that such company has complied with all the requisitions of

this act which apply to such companies, and the name of the attorney appointed to act for the company.

Statement renewed yearly.—Renewal of certificate.—The statement
110 and evidences of investments required by this section shall be renewed from year to year in such manner and form as may be required by said auditor, with an additional statement of the amount of premiums received and losses incurred in this State during the preceding year, so long as such agency continued; and the said auditor, on being satisfied that the capital, securities, and investments remain secure, as hereinbefore provided, shall furnish a renewal of the certificate as aforesaid.

Penalty.—Any violation of any of the provisions of this act shall subject the party violating the same to a penalty of $500 for each violation, and of the additional sum of $100 for each month during which any such agent shall neglect to file such affidavits and statement as are herein required.

Agents, etc.—Advertised.—Every agent of any insurance company shall, in all advertisements of such agency, publish the location
111 of the company, giving the name of the city, town, or village in which the company is located, and the State or government under the laws of which it is organized. The term "agent or agents," used in this section, shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this State.

Section applies to all foreign companies, etc.—The provisions of this section shall apply to all foreign companies, partnerships, associations, and individuals, whether incorporated or not, all insurance companies, associations, or partnerships incorporated by or organized under the laws of any other State of the United States, or any foreign government transacting the business of fire or marine insurance or any other kind of insurance in this State, shall make annual statements of their
112 condition and affairs to the auditor's office in the same manner and in the same form as similar companies organized under the laws of this State.

Penalty for neglect to make annual statement.—In case of neglect or refusal to make such annual statements, as aforesaid, all persons acting in this State as agents or otherwise in transacting the business of insurance for said companies, corporations, associations, partnerships or individuals shall be subject to the same penalties provided by law in case of the failure of any insurance company organized under the laws of this State to make an annual statement, as provided in this act.

When statements filed.—Foreign insurance companies shall be required to make and file their annual statements and evidences on the first day of January in each year, or within thirty days thereafter, made out for the year ending on the preceding thirtieth of September. The
113 supplementary annual statements of their business and affairs in the United States, duly verified by the resident manager of such company, shall be filed in the month of January in each year made out for the year ending the thirty-first day of December immediately preceding.

23. *Examination by auditor or his appointee.*—It shall be the duty of the auditor of public accounts, whenever he shall deem it expedient so to do, in person, or by one or more persons to be appointed by him for that purpose, not officers or agents of in any manner interested in any insurance company doing business in this State, except as policy hold-

ers to examine into the affairs of any insurance company incorporated in this State or doing business by its agents in this State; and it shall be the duty of the officers or agents of any such company doing business in this State to cause their books to be opened for the inspection of the auditor or the person or persons so appointed, and other-
114 wise to facilitate such examination so far as it may be in their power to do, and to pay all reasonable expenses incurred therein; and for that purpose the said auditor or person or persons so appointed by him shall have the power to examine under oath the officers or agents of any company relative to the business of said company, and, whenever the said auditor shall deem it for the best interests of the public so to do, he shall publish the result of said investigation in one or more papers of this State.

When deficiency appears—Proceedings.—And whenever it shall appear to the said auditor from such examination that the assets of any company incorporated in this State are insufficient to justify the continuance in business of any such business, he may direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such period as he may designate in such requisition, or he shall communicate the fact to the attorney-general, whose duty it
115 shall then become to apply to the circuit court of the county in which the principal office of said company shall be located for an order requiring them to show cause why the business of such company should not be closed; and the court shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it shall appear to the satisfaction of said court that the assets and funds of said company are not sufficient as aforesaid, or that the interest of the public so require, the said court shall decree a dissolution of said company and a distribution of its effects. The said circuit court shall have power to refer the application of the attorney-general to a master in chancery to inquire into and report upon the facts stated therein. Any company receiving the aforesaid requisition from the said auditor shall forthwith call upon its stockholders for such amounts as will make its capital equal to the amount fixed by the charter of
116 said company, and in case any stockholder of such company shall refuse or neglect to pay the amount so called for, after notice personally given or by advertisement in such time and manner as the said auditor shall approve, it shall be lawful for the said company to require the return of the original certificate of stock held by such stockholders, and in lieu thereof to issue new certificates for such number of shares as the said stockholders may be entitled to in the proportion that the ascertained value of the funds of said company may be found to bear to the original capital of the said company, the value of such shares for which new certificates shall be issued to be ascertained under the directions of the said auditor and the company paying for the fractional parts of shares; and it shall be lawful for the directors of such company to create new stock and dispose of the same, and to issue new certificates therefor to an amount sufficient to make
117 up the original capital of the company.

Liability of stockholders for additional loss.—And it is hereby declared that in the event of any additional losses accruing upon new risks taken after the expiration of the period limited by the said auditor in the aforesaid requisition for the filling up of the deficiency in the capital of such company, and before said deficiency shall have been made up, the directors shall be individually liable to the extent thereof.

In case of mutual companies.—And if upon such examination it shall

appear to the said auditor that the assets of any company chartered on the plan of mutual insurance under this are insufficient to justify the continuance of such company in business, it shall be his duty to proceed in relation to such company in the same manner as is herein
118 required in regard to joint stock companies, and the trustees or directors of such company are hereby made personally liable for any losses which may be sustained upon risks taken after the expiration of the period limited by said auditor for filling up the deficiency in the capital and before such deficiency shall have been made up.

Transfer of stock not to relieve.—Any transfer of the stock of any company organized under this act made during the pending of any such investigation shall not release the party making the transfer from the liability for losses which may have accrued previous to the transfer.

When company unsound, business stop.—And whenever it shall appear to the said auditor from the report of the person or persons appointed by him that the affairs of any company *not* incorporated by the laws of this are in an unsound condition he shall revoke the certificates
119 granted in behalf of such company, and shall cause a notification thereof to be published in a newspaper of general circulation, published in the city of Springfield, and mail a copy thereof to each agent of the company and the agent or agents of such company after such notice shall be required to discontinue the issuing of any new policy and the renewal of any previously issued.

24. *Suits for penalties.*—Every penalty provided for by this act shall be for and recovered in the name of the people by the state's attorney of the county in which the company or the agent or agents so violating shall be situated, and one-half of said penalty when recovered shall be paid into the treasury of said county, and the other half to the informer of such violation, and in the case of the non-payment of such penalty the party so offending shall be liable to imprisonment for a period not exceeding six months, in the discretion of any court having cognizance thereof; such penalties may also be sued for and recovered
120 in the name of the people by the attorney-general, and when sued for and collected by him shall be paid into the State treasury.

25. *Duration of company, legislative control, &c.*—All companies incorporated or extended under this act may provide in their charters for not more than thirty years' duration; but the legislature may at any time alter or amend this act and provide for the closing up of the business and affairs of any company formed under it. Nothing herein contained shall be construed to prevent subsequent extension of the charters of companies organized or extended under this act.

26. *Rights of old companies.*—Companies other than those organized under the laws of this State which may have received certificates of authority for the year 1869, prior to the passage of this act, shall be permitted to continue to transact the business of insurance with-
121 out further statement until the 31st day of January, 1870.

Lein on stock.—Any fire or *or* fire and marine insurance company, chartered by this State, may have a lien by passing a by-law to that effect upon the stock or certificates of profit owned by any member for any debt hereafter to become due the said company for premiums, by stating that the said stock is subject to any such lien upon the certificates of stock, or profits, and such lien may be waived in writing by the consent of the president of said company, upon the transfer of any such stock.

Stock impaired.—Reduction of stock.—Whenever it shall appear to the auditor of public accounts, from an examination made by him, in the manner prescribed by law, that the capital stock of any joint stock company, organized pursuant to law, is impaired to an amount
122 exceeding twenty-five per cent. of such capital, and he shall be of opinion that the interests of the will not be prejudiced by permitting such company to continue business, with a reduced capital, it shall be lawful for such company, with the permission of said auditor, to reduce its capital stock, and the par value of the shares thereof, to such amount as the said auditor may, under his hand and official seal, certify to be proper, and as shall, in his opinion, be justified by the assets and propert' of such company. Provided, that no part of such assets and property shall be distributed to the stockholders; and provided further, that the capital stock of any such company shall not be reduced to an amount less than the sum now required by law for the organization of a new company, under the general insurance laws, for the transaction of business at the place where such company is located, and of the kind which such company is authorized to transact;
123 no reduction of the capital of any such company shall be made, except upon a resolution of its board of directors, approved by at least two-thirds of the directors, and certified under its corporate seal, signed by the president and at least two-thirds of the directors, or proved or acknowledged in the manner required by law for the proof or acknowledgement of conveyances; which certificates shall be filed in the office of said auditor before any action shall be had by him thereon. The auditor of public accounts, in case he shall permit any such company to reduce its capital in the manner provided in this act, shall execute the certificate required by this act in duplicate, and deliver one of such certificates to the officers of such company, who shall forthwith file the same with the clerk of the county in which such company is located, and the other such certificate shall be
124 filed in the office of said auditor; such company upon filing the certificate with the county clerk as required by this act, shall, with such reduced capital, possess the same rights, and be subject to the same liabilities that it possessed, or was subject to, at the time of the reduction of its capital, and the charter of such company shall be deemed to be amended, in respect to the amount of capital and the par value of the shares, so as to conform to such reduction. It shall be lawful for said company to require the return of the original certificate of stock held by each stockholder, and in lieu thereof to issue new certificate for such number of shares as each stockholder may be entitled to, in the proportion that the reduced capital may be found to bear to the original capital of the company. It shall be lawful for any such company, after its capital shall be so reduced as aforesaid, to increase its capital stock in the mode prescribed by this law.

125 *Receivers, etc., to make statements.*—It shall be the duty of all receivers and trustees of insurance companies, during the month of January in each year, and at any other time when required by the auditor of public accounts, to make and file annual and other statements of their assets and liabilities, and of their income and expenditures in the same manner and form, and under the same penalties as the officers of such companies are now required by law to make annual and other statements to the auditor's office.

Publication of annual statements.—And the said auditor shall also cause its annual statements, required to be filed by this act, to be published in two daily newspapers of general circulation, the one printed

in the city of Chicago and the other printed in the city of Springfield, not less than fifteen days.

27. *Fees.*—There shall be paid by every company, association, person or persons, or agents to whom this act shall apply, the following fees: for filing the declaration or the certified copy of a charter herein required, the sum of $30; for filing the annual statement required, $10.00; for each certificate of authority to agents of companies or associations not incorporated under the laws of this State, $2; for each certificate of authority to agents of companies or associations incorporated under the laws of this State, 50 cents; for every copy of paper filed in this office, the sum of 20 cents per folio, and for affixing the seal of said office to such copy and certifying the same, $1.00; and in case two or more companies shall combine and effect insurance under a joint policy, each and every company shall pay the fees provided herein the same as if each company wrote separate and distinct policies, provided, that the net amount of all fees, over and above the cost of performing the clerical labour connected therewith, shall not exceed under this act the sum of $5,000, and that any amount above the sum shall be paid over to the State treasurer; and, provided further, that the auditor shall render account in his biennial report of the fees received by him under the provisions of this act.

28. *Agents responsible; embezzlement by.*—Agents appointed by any company doing business in this State to solicit *for* application' for insurance, to collect the premiums on the same, and to transact the other duties of agents in such cases, shall be held personally responsible to such company for any moneys received by them for such company, and in case any such agent shall embezzle or fraudulently convert to his own use, or shall take or secrete, with intent to embezzle and convert to his own use without consent of such company, any money belonging to such company which shall have come into his possession, or shall be under his care by virtue of his agency, he shall be deemed by so doing to have committed the crime of larceny, and on conviction shall be subject to the fines and penalties provided by the statute in such cases. See Crim. code, ch. 38, pa. 74, 75.

29. *Reciprocity.*—Whenever the existing or future laws of any State of the United States, or any other kingdom or country, shall require of insurance companies incorporated by, or organized under the laws of this State and having agencies in such other State, kingdom, or country, and deposit or securities in such kingdom, State, or country for the protection of policy-holders, or otherwise of any payment for taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required for such purposes from similar companies of other States by the then existing laws of this State, then, and in every such case all companies of such States establishing, or having heretofore established an agency or agencies in the State, *in the State* shall be and are hereby, required to make the same deposit for a like purpose with the auditor of this State, and to pay to the auditor for taxes, fines, penalties, certificates of authority, license fees, and otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such State upon the companies of this State and the agents thereof; provided, that the payment required of such foreign companies shall in no case be less than required by this act.

30. *Tax on net receipts.*—Every agent of any insurance company incorporated by the authority of any other State or government shall re-

turn to the proper officer of the county, town, or municipality in which the agency, is established, in the month of May, annually, the amount of the net receipts of such agency, which shall be entered on the tax lists of the county, town, or municipality, and subject to the same rate of taxation for all purpose', State, county, town, and municipal that other personal property is subject to at the place where located, said tax to be in lieu of all town and municipal licenses; and all laws and
130 parts of laws inconsistent herewith are hereby repealed, provided that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax or license fee, not exceeding two per cent., in accordance with the provisions of their respective charters on said gross receipts, to be applied exclusively to the support of the fire department of such city. See Cities, etc., ch. 24, pa. 9.

31. *Township companies excepted.*—Nothing in this act shall be so construed as to interfere with the workings or organization of any insurance company organized under an act of the general assembly, entitled "An act to authorize the formation of township insurance companies," approved February 20, 1867, or to any township insurance company chartered by act of this general assembly.

32. *When takes effect.*—This act shall take effect from and after its passage, provided that companies other than those organized
131 under the laws of this State which may have received licenses for the year A. D. 1869, prior to the passage of this act, shall not be obliged to renew application during the said year, but such company shall be subject to examination, at the discretion of the auditor of public accounts, as hereinbefore provided; also that the examination of companies already organized under the laws of this State shall, for the year 1869, be made in the month of July next or as soon thereafter as possible.

Plaintiff next offers in evidence a certified copy of the act of incorporat*ing* of the Great Western Insurance Company.

(Defendant objects to certificate of Edward Rummel, sec. of state date 15th November, A. D. 1872. Certificate withdrawn.)

SEC. 1. Be it enacted by the people of the State of Illinois, represented in the general assembly. That William W. Danenhower, Jacob Russel, Thomas Hall, George Ely, Robert H. Foss, and their suc'essors, assignees and associates, be and are hereby created a body cor-
132 porate and politic under the name and style of the Great Western Insurance Company situated at Chicago, and by that name shall have and enjoy all the rights and privileges and immunities that other like corporations have, and be recognized in all courts of justice and equity in this State.

SEC. 2. When the said party and their associates shall have subscribed one hundred thousand dollars, paying in as a company fund five per cent. on the amount subscribed and securing the balance to be paid on demand or otherwise by approved judgments, notes, hypothecated stocks, mortgages, or real estate in Cook County or other satisfactory security, and shall have chosen nine directors, and those directors *and those directors* have chosen one of their number president and appointed a secretary and treasurer, it shall be deemed fully organized, and enjoy the powers herein conferred.

SECTION 3. The said company shall have the power to make
133 insurance and *and* take risks on all kinds of property, both

marine and fire, and charge and receive such premiums therefor as may be agred by and between the parties either upon mutual or stock principal or both.

SECTION 4. The company shall have power to use, invest, or loan its surplus funds in or on stocks, bottomry, and respondentive in bonds and mortgages or personal security, at such rates as privave, persons may legally do by the laws of this State, and may increase its capital to five hundred thousand dollars.

SECTION. 5. The said company may establish agencies and do all acts not inconsistent with the Constitution and laws of the United States necessary to and for the full use and enjoyments and to carry out the full objects of this act.

SECTION 6. This act shall be deemed a public act, and be liberally construed for the purpose therein contained, and take effect from and after its passage.

134 SAMUEL HOLMES,
Speaker House of Rep's.
JOHN WOOD,
Speaker of the Senate.

Approved Feb. 4th, 1857.

WM. H. BISSE.

UNITED STATES OF AMERICA,
State of Illinois, ss:

I, George H. Harlow, secretary of the State of Illinois, do hereby certify that the foregoing is a true copy of an enrolled law of the State of Illinois, entitled "An act to incorporate the Great Western Insurance Company of Chicago, Illinois," approved February 7th, 1857, the original of which said enrolled is now on file in this office.

In witness whereof I hereto set my hand and affix the great seal of State, at the city of Springfield, this 18th day of April, A. D. 1876.

[SEAL.] GEORGE H. HARLOW,
Sec. of State.

STATE OF ILLINOIS,
Office of the Secretary of State, ss:

135 I, George H. Harlow, secretary of state of Illinois, do hereby certify that it appears from articles on file in this office that on the 22d day of August, A. D. 1870, the capital stock of the said Great Western Insurance Company of Chicago, Illinois, was, by the action, consent, and request of its stockholders and board of directors, authorized to be increased to the sum of five million dollars; and the fourth section of the original act of incorporation of said company was thereby amended and altered so that its capital stock might be increased to five million dollars in conformity to an act of the general assembly of the State of Illinois, entitled "An act to incorporate and to govern fire, marine, and inland navigation insurance companies doing business in the State of Illinois," approved March 11, 1869, which said article is now on file in this office.

In witness whereof I hereto set my hand and affix the great seal of State. Done at Springfield, this 18th day of April, A. D. 1876.

[SEAL.] GEO. H. HARLOW,
Sec. of State.

136 Plaintiff next offers in evidence a certified copy of the act of reincorporation of the Great Western Insurance Company, dated August 22d, A. D. 1870, authorizing an increase of the capital stock of

said company to five million dollars, with the certificates of Geo. H. Harlow, sec. of state, attached, dated April 18th, 1876.

(Defendant objects to the admission of said act in evidence on the ground that the same is irrelevant, immaterial and incompetent. Objection overruled; to which the defendant excepted.)

(Here follow copy of act with certificate.)

UNITED STATES OF AMERICA,
State of Illinois, Office of Secretary of State, ss:

I, George H. Harlow, secretary of state of the State of Illinois, do hereby certify that I have examined the foregoing copies of papers in the matter of the increase of capital stock of the Great Western Insurance Company of Chicago, Illinois, and the attestation thereto
137 annexed of the auditor of public accounts of the State of Illinois, that the said attestation is in due form and in accordance with the laws of the State of Illinois.

That the said attestation is made by the proper officer, the auditor of public accounts of said State, who is by the laws of said State the custodian of the original thereof, and duly authorized to certify and exemplify copies of the same; and that his signature attached to said attestation is genuine.

In testimony whereof I have hereunto set my hand and affixed the great seal of State at the city of Springfield, this 18th day of April, A. D. 1876.

[SEAL.] GEO. H. HARLOW,
Secretary of State.

STATE OF ILLINOIS,
Auditor's Office, Department of Insurance:

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that I have compared the annexed
138 copies of papers in the matter of the increase of capital of the Great Western Insurance Company, of Chicago, Illinois, with the original on file in this office, and that the same are correct transcript therefrom and of the whole of said originals.

In witness whereof I have hereto set my hand and affixed my official seal, at the city of Springfield, this 18th day of April, A. D. 1876.

[SEAL.] C. E. LIPPINCOTT,
Auditor of Public Accounts.

A.

OFFICE OF THE GREAT WESTERN INSURANCE COMPANY,
Chicago, Illinois, August 22d, 1870.

We, the undersigned, directors of the Great Western Insurance Company, of Chicago, Illinois, being duly sworn according to law, depose and say, and each one for himself says, that we compose a majority of the directors of the Great Western Insurance , of Chicago, Illinois, aforesaid; that said Great Western Insurance Company has a capital stock of five million dollars, divided into fifty thousand
139 shares of one hundred dollars. One million and twelve thousand dollars of said capital is subscribed, and that eighteen & $\frac{33}{100}$ averaged dollars upon each share, amounting in the aggregate to one hundred eighty-six thousand three hundred and thirty-five & $\frac{33}{100}$ dollars has been paid in by the several holders of the stock of said

company, and said money has been paid in in cash by the stockholders towards the payment of their respective shares, and not for any other purpose whatever, and it is intended that the same shall remain as the capital of the company, and that the same is now invested as required by the law of this State.

H. L. STEWART.
JAMES MONTGOMERY.
H. H. PECK.
J. D. WOODWARD.
R. J. WATERS.
C. D. HOOKER.
CHAS. J. STOKES,
WASHINGTON LIBBY.
CHARLES B. SMITH.
A. S. PECK.
140 M. SMITH.
G. N. ARCHIBALD.
J. M. W. JONES.
E. EUGENE CALDWELL.
W. W. STURGIS.
CHAS. V. DYER.
J. M. K. SANGER.
L. S. MAYOR,
$5,000 stock, 20 per cent. paid in.

Subscribed and sworn to before me by each of the subscribers hereto on this 22nd day of August, 1870.

Given under my hand and official seal.

[SEAL.] GEORGE C. CHRISTIAN,
Notary Public.

The following endorsement appears on the back of the foregoing instrument:

State of Illinois, auditor's office, department of insurance. Life. Oath of directors of the Great Western Insurance Company, of Chi-
141 cago, Illinois. August 15, 1870. Filed August 23d, 1870. C. E. Lippincott, auditor of public accounts.

B.

Notice.

The Great Western Insurance Company, of Chicago, Illinois, hereby give notice that it is the intention to increase its capital stock to five million dollars, three-fourth' in amount of the stockholders thereof having given their written consent to such measure.

H. L. STEWART, *President.*

C. D. HOOKER, *Secretary.*

CHICAGO, *Illinois, June* 25, 1870.

I, the undersigned, one of the publishers of the Chicago Tribune, do hereby certify that a notice, of which the annexed is a true copy, was published for four successive weeks, to wit, four times in the daily edition of the Chicago Tribune, a newspaper published in the city of Chicago, and of general circulation throughout the county of Cook,

and State of Illinois, and that the date of the first paper
142 containing the same was the 29th day of June, A. D. 1870, and that the date of the last paper containing the same was the 20th day of July, A. D. 1870.

Dated at Chicago this 23d day of July, 1870.

[COMPANY SEAL.]

TRIBUNE CO.,
Publisher,
By J. T. FLYNN,
Cashier.

[Rev. stamp.]

C.

We, the undersigned, stockholders of the Great Western Insurance Company of Chicago, Illinois, do hereby assent to and express our desire that the capital stock of said company shall be increased to five *of* millions of dollars.

STOCKHOLDERS.

Names.	Names.	Names.
H. L. Stewart.	John Lassen.	O. D. Moores.
C. D. Hooker.	Chas. V. Dyer.	J. B. Sullivan.
H. H. Peck.	Jno. F. Eberhart.	Cass, Porter & Barrows.
Simeon Chase.	Austin Crover.	Peter Caldwell.
Chas. J. Stokes.	O. L. Mann.	Abram Vandusen.
R. J. Waters.	J. M. W. Jones.	Saterlere, Classen & Co.
J. T. Foster.	Chas. Shober.	Lewis Benedict & Co.
Chas. B. Smith.	M. Smith.	Frederick Hishold.
143 J. R. Shepherd.	Robt. H. Foss.	W. N. Sturgis.
J. M. K. Langer.	E. C. Stevens.	H. H. Newell.
Washington Libley.	J. D. Woodward.	A. B. Pullman.
J. T. Wallace.	Fernando Jones.	P. Shirley.
L. P. Sanger.	James W. Kees.	A. C. Stewart.
Benj. Casen.	John W. Deane.	E. Eugene Caldwell.
Philip Wadworth.	A. S. Peck.	Mary C. Sanger.
James Montgomery.	Louis Nelkee.	E. Van Buren.
L. S. Mayor.		

D.

Charter of The Great Western Insurance Company of Chicago, Ills.

An act to incorporate The Great Western Insurance Company of Chicago, Illinois.

SEC. 1. Be it enacted by the people of the State of Illinois represented in the general assembly, that William W. Danenhower, Jacob Russell, Thomas Hale, George Ely, Robert H. Foss, and their successors and associates be and are hereby created a body corporate and politic under the name and style of The Great Western Insurance Company, situated at Chicago, and by that name shall have and enjoy all the rights and privileges and immunities that other like corporations have, and be recognized in all courts of justice and equity in this State.

SECT. 2. When the said party and their associates shall have

144 subscribed one hundred thousand dollars paying in as a company fund five per cent. on the amount subscribed, and securing the balance to be paid on demand or otherwise by approved judgment notes, by hypothecated stock mortgages on real estate in Cook County or other satisfactory security, and shall have chosen nine directors, and these directors shall have chosen one of their number president, and appointed a secretary and treasurer, it shall be deemed fully organized and enjoy the power herein conferred.

SEC. 3. The said company shall have power to make insurance and take risks on all kinds of property, both marine and fire, and charge and receive such premiums as may be agreed by and between the parties either upon the mutual or stock principle or both.

SEC. 4. The company shall have power to use, invest, or loan its surplus funds in or on stocks, bottomry, or respondentia, in bonds, mortgages, or personal security at such rates as private persons may legally do by laws of this State, and may increase its capital to five hundred thousand dollars.

SEC. 5. The said company may establish agencies, and do all acts not inconsistent with the constitution, the laws of this State or the United States necessary to and for the full use and enjoyment, and to carry out the full objects of this act.

SEC. 6. This act shall be deemed a private act and be literally construed for the purpose therein contained, and take effect from and after its passage. Approved February 4th, 1857.

145 E.

Amendment to section 4.

It is desired that this charter be amended so that section 4 shall read:

The company shall have power to use, invest, or loan its surplus funds in or on stocks, bottomry, and respondentia, on mortgages or personal securities at such rates as private persons may legally do by the laws of this State, and may increase its capital to five millions of dollars.

Given under the seal of the Great Western Insurance Company this twenty-seventh day of June, 1870.

{ GREAT WESTERN INSURANCE COMPANY SEAL. }

H. L. STEWART,
President.

C. D. HOOKER, *Sec'y.*

F.

STATE OF ILLINOIS, ATTORNEY-GENERAL' OFFICE,
Springfield, July 28th, 1870.

I, Washington Bushnell, attorney-general of the State of Illinois, do hereby certify that I have examined the charter, amendments thereto, proof of publication, and the accompanying papers in the matter of an increase of capital of the Great Western Fire Insurance Company of Chicago, Illinois, to "five millions of dollars, and I find said papers conformable to the act of the general assembly of the State of Illinois, approved March 11, 1869, and entitled an act to incorporate and to govern fire, marine, and inland navigation insurance companies
146 doing business in the State of Illinois," and not inconsistent with the laws and constitution of the State of Illinois.

W. BUSHNELL,
Attorney-General of Ill's.

To General C. E. LIPPINCOTT,
Auditor P. A., Springfield, Ills.

AUDITOR'S OFFICE, ILLINOIS,
BUREAU OF INSURANCE,
Springfield, April 18, 1876.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify from papers on file in this office that on the 22d day of August, A. D. 1870, the capital stock of the Great Western Insurance Company of Chicago, Illinois, was, by the action, consent, and request of its stockholders and board of directors, authorized to be increased to the sum of five million dollars, and the fourth section of the orignal act of incorporation of said company was thereby amended and altered so that its capital stock might be increased to five million dollars in conformity to an act of the general assembly of the State of Illinois, approved March 11, 1869.

In testimony whereof I hereunto subscribe my name and affix the seal of my office, at Springfield, the day and date first above written.

[SEAL.] C. E. LIPPINCOTT, *Auditor P. A.*

147 UNITED STATES OF AMERICA,
State of Illinois, Office of Secretary, ss:

I, George H. Harlow, secretary of the State of Illinois, do hereby certify that the foregoing is a true copy of the proceedings of the Great Western Insurance Company of Chicago, Illinois, increasing their capital stock to five million dollars, also a copy of the charter and amendments thereto of said company now on file in this office.

In witness whereof I hereto set my hand and affix the great seal of State, at the city of Springfield, this 18th day of April, A. D. 1876.

[SEAL.] GEORGE H. HARLOW,
Secretary of State.

The plaintiff next offers in evidence the annual statement of the Great Western Insurance Company to the auditor of public accounts, department of insurance, State of Illinois, made in pursuance of law of 1869, together with the accompanying documents and certificates certifying an examination, made. To all of which the defendant objects on the ground of being immaterial, irrelevant, and incompetent. Objections overruled by the court, to which the defendant excepts. (Here follows a copy of the annual statement referred to above with accompanying documents and certificates.)

148 UNITED STATES OF AMERICA,
State of Illinois, office of Secretary of State, ss:

I, George H. Harlow, secretary of state of the State of Illinois, do hereby certify that I have examined the foregoing statement of the affairs of the Great Western Insurance Company of Chicago, Illinois, and the attestations thereto annexed of the auditor of public accounts of the State of Illinois, that the said attestation is in due form and in accordance with the laws of the State of Illinois; that the said attestation is made by proper officer, the auditor of public accounts of said State, the custodian of the original thereof, and duly authorized to certify and exemplify copies of the same; and that his signature attached to said attestation is genuine.

In witness whereof I hereunto set my hand and caused the great seal

of the State to be affixed, at the city of Springfield, this 18th day of May, A. D. 1876.

[SEAL.] GEORGE H. HARLOW,
Secretary of State.

AUDITOR'S OFFICE, ILLINOIS,
Bureau of Insurance:

I, Charles E. Lippincott, auditor of public accounts of the State
149 of Illinois, do hereby certify that on the twenty-seventh day of January, A. D. 1871, I made an examination of the affairs of the Great Western Insurance Company of Chicago, Illinois, by Lotus Niles, esq., my agent, duly appointed by me in conformity to law, and that the annexed is a true and correct copy of the report of said Lotus Niles, concerning said examination.

In testimony whereof I hereunto subscribe my name and affix the seal of my office, at Springfield, this 18th day of April, A. D. 1876.

C. E. LIPPINCOTT, *Aud. P. A.*

STATE OF ILLINOIS, AUDITOR'S OFFICE,
DEPARTMENT OF INSURANCE,
Springfield, Jan'y 19, 1871.

To LOTUS NILES, Esq., *Springfield:*

SIR: In pursuance of the provisions of the act of the general assembly of the State of Illinois, entitled, "An act to incorporate and to govern fire, marine and inland navigation insurance companies, doing business in the State of Illinois," approved March 26th, 1869, you are hereby appointed and authorized to examine the capital, securities, and affairs of the Great Western Fire Insurance Company of Chicago, in the State of Illinois, and make report to me, under your own
150 oath and the oaths of the president and secretary of said company, according to the forms annexed to this appointment.

In testimony whereof I hereto subscribe name, and affix my seal of office the day and year first above written.

[SEAL.] (Signed) C. E. LIPPINCOTT,
Auditor of Public Accounts.

To the Hon. C. E. LIPPINCOTT,
Auditor of Public Accounts of the State of Illinois:

The undersigned, in pursuance of the appointment hereto annexed bearing date the 19th day of January, A. D. 1871, has personally made an examination of the capital, securities, and affairs of the Great Western Insurance Company of the city of Chicago, in the State of Illinois, an insurance company claiming to have complied with all the requirements of said act, and hereby certifies that the capital of said company, as fixed by its charter, is thousand, of which there has been two hundred twenty-two thousand eight hundred thirty-one $\frac{42}{100}$ (222,831.42) dollars paid in, and is now possessed by said company in money or in the stocks, bonds, and mortgages required by said act aforesaid
as part of the assets of the company, as shown in Schedule A,
151 hereunto annexed; and the statement of the affairs of the company, and attached hereto and marked Schedule B, has been carefully compared by me with the books, vouchers, and papers of the company, as now on file in the company' office, and I find said statement in every particular to be correct, except as modified or changed

in Schedule A & B hereto attached, and the officers of said company have furnished me satisfactory evidence that the company in its own right is possessed of all the assets and property as claimed in said statement.

In testimony whereof I hereto subscribe my name, this 29th day of January, A. D. 1871.

(Signed) LOTUS NILES.

STATE OF ILLINOIS, *County:*

I, Lotus Niles, do solemnly swear that the foregoing report subscribed by me is true in every particular, to the best of my knowledge, information and belief.

(Signed) LOTUS NILES.

Sworn to before me and subscribed in my presence by the above-named Lotus Niles, this 27th day of January, A. D. 1871.

Given under my hand and official seal.

[NOTARIAL SEAL.] (Signed) RUSSELL I. WATERS,
Notary Public.

STATE OF ILLINOIS,
County of Cook, ss:

Russell I. Waters and Chester D. Hooker do solemnly swear that said Russell D. Waters is the vice-president and said Chester D. Hooker is the secretary of the Great Western Insurance Company above
152 named; that said company is organized in good faith for the purpose of transacting the business of fire insurance at Chicago, in the State of Illinois; that the securities and property exhibited by them as the assets of said company to the above-named Lotus Niles (who was appointed by the auditor to examine the same), are truly set forth and specified in Schedule A, hereto annexed, and are bona fide the property of and now owned and possessed by said company in its corporate capacity; that no part of said assets has been withdrawn, pledged, or in any manner impaired, nor loaned or advanced to said company for the purpose of being exhibited as part of its assets.

(Signed) RUSSELL I. WATERS,
Vice-Pres't.

(Signed) C. D. HOOKER, *Secretary.*

Sworn to by the said Russell I. Waters and Chester D. Hooker before me, and subscribed to by them in my presence, this 27th day of January, A. D. 1871.

(Signed) LOTUS NILES.

153 *Schedule A, containing a particular description of all the actual assets owned by the Great Western Fire Insurance Company on the 31st day of December,* 1870.

Amount of cash in hand in company's office, as shown by the company's books	428 97
Amount of cash deposited in the Third National Bank of Chicago, verified by the books of the bank	4,874 50
Amount of cash in hands of agent, and in course of transmission—this is the balance due of agents' accounts since Oct., 1870—the largest portion of which is of the month of Dec., 1870, and is probably good	35,800 55

Loans on bonds and mortgages on which less than one year's interest is due, duly recorded and being first liens in fee simple, as per Schedule B. The amount of said loan on real estate lying in the State of Illinois is (and evidence of record and value was exhibited, and in the case of all taken since previous examination abstracts of title were furnished) the sworn statement of I. T. Foster, Geo. W. Parker, freeholders of Chicago, verified the value placed on No. 77099 of the schedule.....		162,100 00
The statement of Harlow H. Peck was received as to the value of No. 73889 and 73275, affidavit' were furnished to the balance of the property. The amount of said loans on real estate lying in the State of Iowa is $21,075.00, the usual evidence of record is endorsed on the mortgages, and a sworn statement of three citizens of Iowa was furnished as to the value of the land lying in Davis Co.; statement was furnished, but not under oath, as to the lands in Clayton and Chickasaw Counties; no abstracts of titles or certificates thereof were furnished; I called the attention of the co. to sec. 8 of the insurance law, which, in effect, prohibits loans on real estate lying out of this State; I have not thought it best, from the foregoing facts, to extend this amount.		
154 2 Chicago West Side City Park bonds, 8%, No. 154, $200 and 156, $160		360 00
9 Chicago N. W. R. R. land certificates, 1860, $490; 413, $480; 520, $1,920; 512, $960; 503, $960; 507, $960; 510, $960; 495, $480; 499, $480.....		4,530 00
Amount of interest on notes for premiums due		583 91
Interest accrued, but not due on bonds mortgages (including interest) on the Iowa mortgages.....		10,345 25
Bills receivable held by the company considered good, viz, stock notes drawing no interest		7,495 00
Notes for premiums mostly for current business in 1870..		8,528 13
Amount of United States internal revenue stamps on hand.....		51 25
Amount of all other property belonging to the company consisting of the following items, office furniture, $1,569.47		1,569 47
Horse, buggy, and outfit.....		650 00
Charter expenses $2,000.00; this item I do not value.....		
Amount due from "city collections" for commissions brokerage, money loaned, stock, etc., being ledger balances		11,503 83
		248,820 86

NOTE A.—The gross amount of cash actually received during the year for premiums includes the amount in the hands of ag'ts and in the course of transmission.

NOTE B.—Amount paid during the year for salaries, fees, and all charges of officers and directors of the company includes the salaries of general agents.

NOTE C.—Amount paid during the year for national taxes and dues includes the amount paid for stamps, taxes, $327.06, rev. stamps, 1,171.63.

NOTE D.—General expense supplies and advertising embraces the

following items, viz, stock com's, $7,987.10; advertising, $950.91; charter, $2,000.00; supplies, $4,917.59; interest, $1,172.82; foreign exp. $5,272.53; city expenses, $3,527.97; office furniture and fixt., $2,219.47; sundry expenses not included in the foregoing, $5,592.87; profit and loss, $37.50.

155 (Signed) LOTUS NILES.

On the back of the foregoing the following endorsement appears. State of Illinois, auditor's office, department of insurance. Examination of the affairs of the Great Western Fire Insurance Company of Chicago, in the State of Illinois. Filed February 27, 1871. (Signed.) C. E. Lippincott, auditor public accounts.

STATE OF ILLINOIS,

Auditor's Office, Department of Insurance:

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that I have compared the annexed copy of the annual statement of the condition of the Great Western Insurance Company of Chicago, Illinois for the year ending Dec. 31, 1870, made to this office pursuant to law with the original on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original statement.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Springfield, this eighteenth day of April A. D. 1876.

[SEAL.] C. E. LIPPINCOTT,
Auditor of Public Accts.

156 *Annual statement of the condition of the Great Western Fire Insurance Company, of Chicago, in the State of Illinois, for the year ending on the 31st day of December, 1870, made to the auditor of public accounts of the State of Illinois, pursuant to the laws of said State.*

1. CAPITAL.

The amount of capital stock of the company now outstanding (par value of shares $100 each) is		1,188,000 00
" " " paid up " " " "		222,831 42
Amount of unpaid subscribed capital, for which the subscriber' or holders are liable		965,168 58

2. ASSETS.

Value of real estate owned by the company, less $, the amount of all incumbrances there, as per schedule "A," hereunto annexed		
The amount of cash on hand in the company' office	410 16	
The amount of cash deposited in the 3d National Bank	6,022 37	
The amount of cash deposited in the Wilkins and Stone's Bank	10,600 00	
The amount of cash in hands of agents and in course of transmission	26,300 55	
Total cash		43,333 08
Loans on bonds and mortgages (duly recorded and being first lien on the fee simple), upon which less than one year's interest is due, as per schedule "B"		183,175 00
Amount of such bonds and mortgage loans upon which interest is due for *or* one year or more, as per schedule "B"		
The amount due the company on which judgments have been obtained		

The amount of stocks of the State of Illinois, of stocks and Treasury notes of the United States, of stocks and bonds of incorporated cities in the State of Illinois, and of all other stocks and bonds and bonds absolutely owned by the company:

	Total par value.	Total market value.	
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
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Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Chicago West Side City Park bonds, 8 %	360 00	360 00	
C. and N. W. R. R. land certificates	9, 060 00	4, 530 00	
Total par and market value, carried out at market value	9, 420 00	4, 890 00	4, 890 00
157 Assets continued—amount brought forward			231, 398 08

The amount of stocks, bonds, and all other securities, except mortgages held by the company as collateral security for cash actually loaned by the company, with the par and market value of the same, and the amount loaned on each:

	Total par value.	Total market value.	Amt. loaned thereon.
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
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Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Shares, $, each of stock			
Total amount of par and market value, and amount loaned thereon, carried out at amount loaned	$	$	$

Amount of assessments on stock or premium notes paid or unpaid, specifying each	$	
The amount of premium notes on hand, on which policies are issued	$	
The amount of installment notes on hand, on which policies are issued	$	
Amount of interest actually due the company and unpaid	$	
Interest accrued, but not due		10, 345 25
Bills receivable held by the company, considered good		16, 607 04
Amount due for unpaid premiums, not including the items "cash in course of transmission" or bills receivable, above		
Amounts due for rents, including rents accrued, but not due		
Amount of United States internal-revenue stamps on hand		51 25
Amount of all other property belonging to the company, consisting of the following items:		
Office furniture, horse, buggy and outfit, and personal property		4, 219 47
Due from insurance co.'s and city collections		11, 503 89
The aggregate amount of all the actual available assets of the company		274, 124 92

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3. LIABILITIES.

Amount of losses due and unpaid		
Amount of losses adjusted but not due	1,417 68	
Am't of losses incurred during the year, including those claimed and not yet due and including those reported upon which no action has been taken	3,183 71	
Am't of claims for losses resisted by the company		
Total am't of losses unpaid, including those unadjusted, reported, and resisted		4,601 39
Amount of cash dividends, declared and due remaining unpaid		
Amount of cash dividends declared but not yet due		
Amount of interest due to scrip-holders remaining unpaid, including int. declared but not yet due		
Amount unpaid on scrip ordered to be redeemed		
Am't due and to become due for borrowed money secured by the following collaterals		
Am't of unearned premiums or premiums received on unexpired risks	80,838 69	
Am't received for marine (ocean) premiums not marked off, cash $, notes $, total		
Am't required to safely reinsure all the outstanding risks of the company estimated		
At an average of 40 per cent. of unexpired premiums	32,335 47	
Am't of all other claims against the company, consisting of the following items, bills payable		1,634 09
Aggregate amount of all unpaid losses, claims, and liabilities (except capital stock)		38,570 95

4. INCOME.

	For fire risks.	For inland nav. risks.	Dolls.	Cts.
Gross am't of cash actually rec'd during the year for premiums	74,996 58			
Deduct am't paid for reinsurance, and am't paid to the issued for drawbacks and ret. prem's	2,245 19			
Total net am't of cash actually rece'd during the year for prem's, carried out			72,751	39
Premiums on risks written during the year not actually paid in cash during the year, including all prem's paid by notes or bills upon which cash has not been rece'd during the year	8,087 30			
Am't rece'd for interest on bonds and mortgages during the year				

Am't rece'd for interest during the year from all other source'	
Am't for rents received during the year	
Am't of income received during the year from all other source consisting of the following items	
Aggregate am't of income actually received during the year in cash	72,751 39

5. EXPENDITURES.

	For fire risk.	For inland or nav. marine risks.	Dolls.	Cts.
Am't paid for losses which accrued prior to 1st day of Jan'y last, saving and deducting salvage. Which losses were estimated in the last statement at $				
Am't paid for losses which accrued during the year deducting saving and salvage	5,344 11			
Total am'ts actually during the year for losses				5,344 11

Amount of cash dividends actually paid during the year	
Amount of interest paid to scrip-holders during the year	
Amount of scrip redeemed in cash during the year	
Amount paid during the year for interest on borrowed money	
Amount paid during the year to agents, brokers, and persons other than officers and directors of the Co. for com'ns on premiums	5,966 64
Am't paid during the year for salaries, fees, and all charges of officers and directors of the company	11,985 69
Am't paid during the year for State and local taxes $, the am't of State and local taxes paid in Illinois $	
Am't paid during the year for national taxes and duties	1,498 69
Am't of all other payments and expenditures during the year, consisting of the following items	
General expenses and supplies adv	33,678 78
	52,474 21

	Fire risks.	Inland navigation or marine risks.	Dolls.	Cts.	Perpetual fire risks.	Aggregate.
Gross am't of risks written during the year	4,199,939 96					
Deduct amount of reinsurance effected thereon	30,500 00					
Net am't of risks written during the year						4,169,439 96

	Having not more than one year to run.	Having more than one and not more than three years to run.	Having more than 3 yrs to run.	Perpetual risks.	Aggregate.
Am't of fire risks in force at the end of the year	3,923,931 63	170,945 00	75,563 33		
Am't of inland navigation risks in force at the end of the year					
Am't of marine risks in force at the end of the year					
Aggregate am't of risks in force Dec. 31st, 18					4,169,439 96

Am't deposited in different States and counties, under the laws thereof for the security of policy holders of the United States

Am't deposited in different States and counties, under the laws thereof, for the security of persons insured in such States or counties exclusively

Total am't loaned to directors of the company on bond and mortgage stock, and other loans 143,800 00

The am't of notes originally forming the capital of the company (if any)

The am't of notes now held by the company considered as a part of the capital of the company

The least am't of the company stock owned by any one of the directors as its par value is 500 00

The total am't of the company stock owned by all of the directors as its par value is 719,000 00

Am't of cash dividends declared to stockholders during the year

The total am't of stock dividends declared to stockholders since the company commenced business is

The average annual percentage of cash dividends declared to stockholders since the company commenced business is per cent. on full paid capital.

The par value of the stock company per share is $100; market value per share is $20.*

Are dividends declared on premiums received for risks not terminated? Answer. Yes.

The number of agents employed by the company in the State of Illinois is 93; in other States

The principal office of the company is located at Chicago, Cook Co., Illinois,

The company was incorporated Feb. 4, 1857; commenced business, June 27th, 1870; the duration of the charter is perpetual years.

Companies will please state:	Fire risks.	Inland navigation or marine risks.	Dolls.	Cts.	Aggregate.
Am't of risks taken during the past year in the State of Illinois	2,010,135 16				
Am't of premiums received during past year in the State of Illinois	33,373 16				
Am't of losses incurred during the past year in the State of Illinois	3,568 92				

* NOTE.—Companies incorporated by any other State of the United States, or any other country or kingdom, must accompany this statement with a copy of the last annual report (if any) made under any law of the State or country by which said company was incorporated.

160 STATE OF ILLINOIS,
County of Cook, ss:

H. L. Stewart, president, and C. D. Hooker, secretary of the Great Western Company, being duly sworn, depose and say, and each for himself says, that they are the above-described officers of the said company, and that on the thirty-first day of December last all of the above-described assets were the absolute property of the said company, free and clear from any lien or claims thereon except as above stated, and that the foregoing statement, with the s'hedules and explanations hereto annexed, and by them subscribed, are a true, full, and correct statement of the condition and affairs of the said company on the thirty-first day of December last, and for the year ending on that day, according to the best of their information, knowledge, and belief, respectively.

[COMPANY SEAL.] (Signed) H. L. STEWART,
President.

(Signed) C. D. HOOKER,
Secretary.

Subscribed and sworn to before me this 10th day of January, 1871.

[NOTARIAL SEAL.] (Singed) HENRY WISNER,
Notary Public.

Schedule A, containing the locations and a brief description of all the real estate owned by the insurance company on the 31st day of December, 18 , with the company valuation thereof, and a correct statement of the nature and amount of all liens and encumbrances thereon.

Quantity or dimensions. No. of land, size, & description of buildings.	Location, street, and number.	Valuation. Premises.	Description & nature of encumbrance.	Amount of encumbrance.

(Signed) H. L. STEWART,
President.

(Signed) C. D. HOOKER,
Secretary.

SCHEDULE B.—*Containing a description of all the bonds and mortgages owned by the Great Western Insurance Company on the 31st day of December, 1870, the amount of principal unpaid thereon, with the company valuation of the mortgaged premises, the amount of which the company hold fire insurance policies on the buildings as collateral security, and the location and dimensions of the land, with the size and descriptions of the buildings.*

No.	Names of mortgagors.	Date of mortgage.	Mortgages recorded. County of—	Book.	Page.	Am't. of principal unpaid.	Valuation of premises, including b'ld'gs.	Am't of ins. held by co. on the b'ld'gs.	Location, s't and number.	Quantity or dimensions of land, and size and description of buildings.
54636	H. L. Stuart	June 1, 1870	Cook	134	372	40,000 00	621,000 00		Sec. 1, R. 13, T. 38	38 acres, S. Chicago.
12479	Abner Peck	April 28, "	Knox	12	479	10,000 00	20,000 00	6,000 00	" 3 " 3, " 13	1,600 " Knox Co., Ills.
54162	I. M. W. Jones	May 1, "	Cook	137	360	10,000 00	15,000 00		" 17 " 14, 40	Block 25 & 26, Chicago.
53251	H. N. Waterman	May " "	"	134	359	2,000 00	3,000 00		Block 23, lot 2	W. Chicago.
	S. C. Chamberlain	Ap'l 21, "	Winn'bag.	43	293	2,500 00	4,000 00		Sec. 23, R. 1, T. 44	Lots 1, 2, 3, 4, 5, 6, and 8.
52905	Harlow H. Peck	March 22, "	Cook	134	355	3,600 00	5,400 00		" 6, " 14, " 39	" 8, 9, 23, 3, 1, 2.
52907	E. Eugene Caldwell	April 14, "	"	145	394	3,600 00	5,400 00		" 6, " 14, " 39	Block 123, lots 7, 1, 1, 2, 18.
52906	Russell I. Waters	M'ch 10, "	"	134	356	1,800 00	2,800 00		" 6, " 14, " 39	Lots 10, 11, 11, Chicago.
52908	H. N. Waterman	Ap'l 23, "	"	145	395	3,600 00	4,500 00		" 6, " 14, " 39	" 4, 12, 13 & 16, "
2921	C. D. Hooker	Ap'l 21, "	Lake	34	463	1,200 00	2,000 00		Block 23	" 4, Highland Park.
54637	H. H. Peck	June 1, "	Cook	134	384	600 00	900 00		Sec. 6, R. 14, T. 39	" 7, W. Chicago.
54516	H. H. Peck	May 23, "	"	134	373	1,200 00	1,800 00		" 6, " 14, " 39	" 45
55134	O. P. Axtell	June 4, "	"	135	538	10,000 00	20,000 00		" 14, 212, 14, 35	240 acres.
51808	M. Smith	May 9, "	"	134	347	10,000 00	15,000 00		" 13, " 13, 37	40 "
54263	A. S. Peck	June 3, "	"	134	365	516,000 00	22,000 00		" 17, 18, 14, 13	Block 14, 22 lots.
2954	I. D. Woodward	June 8, "	Lake	34	470	12,000 00	2,000 00		Block 23	Lot 22.
45	S. C. Chamberlain	Nov. 13, "	Winnebago	29	310	3,000 00	5,000 00		" 12, 14, 38	160 acres.
68936	James Montgomery	Oct. 10, "	Cook	154	392	20,000 00	45,000 00		Sec. 14 4, T. 20	Block 3, S. Chicago.
74259	I. D. Woodward	Nov. 23, "	"	641	216	15,000 00	39,000 00	8,000 00	Lot 881, Bl'k 12	Riverside.
	I. D. Woodward	Nov. 19, "	"	149	354	800 00	1,600 00		Sec. 9, R. 14, T. 35	Block 1, lot 35.
73889	I. D. Woodward	Nov. 15, "	"	154	539	2,000 00	4,000 00		" 9, " 14, " 38	" 2, " 16.
73275	Mary C. Sanger	Dec. 16, "	"	155	32	10,000 00	30,000 00		" 32, 41 " 14	10 acres.
77099	I. W. Ellis	Aug. 27, "	Davis Co., Iowa	a	516	2,000 00	7,000 00		Bt. SE¼. Sec. 25, R. 70	T. 14, SE. ¼ of SE. ¼, S. 16, 70, 14.
	I. B. Gleen	" " "	" " "	"	518	2,000 00	4,500 00		Lot 3, Bl'k 18	Bloomfield, Iowa.
	Baptist Hardey	" " "	"	"	514	1,000 00	2,000 00		E. ½ of SW. ¼	S. 30, 68, 13.
	E. G. Hardey	" " "	"	"	520	1,000 00	2,500 00		W. ½ of SW. ¼	Sec. 30, 68, 13.
	Geo. Duffield	" " "	"	"	526	2,000 00	5,000 00		Lot 6, Bl'k 18	Bloomfield, Iowa.
	Wm. G. Davis	" " "	"	"	522	1,000 00	2,500 00		E. ½ of SW. ¼	S. 5, 68, 13.
	Amon Brouk	" " "	"	"	527	1,000 00	2,000 00		P. T. NE. ¼, S. 4	67, 13, & SW. ¼ of SW. 35, 68, 13.
	I. R. Sheafer	" " "	"	"	525	1,000 00	2,700 00		Lot 17, Bl'k 18	Bloomfield, Iowa.
	Thos. Davis	" " "	"	"	521	2,000 00	4,000 00		E. ½ SW. ¼	S. 5, T. 68, R. 13, 80 acres.
	A. H. Putnam	" " "	"	"	519	2,000 00	5,000 00		S. ½ of SE. ¼	Sec. 20, 69, 14, & N. ½ NE. ¼, S. 29, 69, 14.

SCHEDULE B.—*Containing a description of all the bonds, &c.*—Continued.

No.	Names of mortgagors.	Date of mortgage.	Mortgages recorded. County of—	Book.	Page.	Am't of principal unpaid.	Valuation of premises, including b'ld'gs.	Am't of ins. held by co. on the b'ld'gs.	Location, st. and number.	Quantity or dimensions of land, and size and description of buildings.
	Wm. Hill	" " "	"	"	524	2,000 00	10,000 00	.....	Pt. of Bl'k 24	Bloomfield, Iowa.
	T. M. Fenton	" " "	"	"	527	1,000 00	2,500 00	.....	Lots 1 & 2, B. 18	" "
	Ina M. Johnson	" " "	"	"	515	200 00	1,200 00	.....	" 2 " 10	" "
	L. D. Tribelock	" " "	"	"	523	2,000 00	3,500 00	.....	" 2 " 38	" "
	Horace Hamilton	Nov. 8, "	Clayton, Ia	3	284	100 00	400 00	.....	" 12 & 3, " 10	McGregor, Iowa.
	A. J. Jordan	" " "	" "	2	458	200 00	400 00	.....	" 11 & 12, " 36	" "
	Oli Nelson	" " "	" "	12	198	200 00	800 00	.....	Sec. 15, R. 3, T. 95	80 acres.
	T. E. Carter	" " "	Chickesaw, Ia	G.	340	375 00	1,000 00	.....	" 22, 14, 96	40 "

(Signed) H. L. STEWART, *President.*
(Signed) C. D. HOOKER, *Secretary.*

162 The following endorsement appears on the back of the foregoing paper:

State of Illinois, auditor's office, department of ins. Annual statement of the Great Western Insurance Company, of Chicago, Illinois, on December 31st, 1870. Filed in auditor' office, February 27th, 1871. (Signed) C. E. Lippincott, auditor public accounts.

Plaintiff next offers in evidence certificate of authority from the auditor of the State of Illinois to Great Western Insurance Company to transact business from the insurance department, of which the auditor is the head, to which the defendant objects, on the ground of being irrelevant, immaterial, and incompetent. Objection overruled by the court, to which defendants excepts.

Here follows copy of certificate of authority, in words and figures as follows, to wit:

AUDITOR'S OFFICE, ILLINOIS,
Bureau of Insurance:

I, Charles E. Lippincott, auditor of public accounts of the State, hereby certify that the annexed is a true and correct copy of certificate of authority issued to J. B. Crawford, of Dixon, Ill's, to act as agent of the Great Western Insurance Company, of Chicago, Illinois, as appears from the records of my office.

In testimony whereof I hereunto subscribe my name and affix the seal of my office, at Springfield, this 6' day of March, A. D. 1873.

[SEAL.] C. E. LIPPINCOTT,
Auditor P. A.

163 STATE OF ILLINOIS,
Auditor's Office, Insurance Department:

SPRINGFIELD, *Feb.* 27, 1871.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that there has been filed in this office a sworn statement showing the condition of the Great Western Insurance Company, located at Chicago, in the State of Illinois, on the 31st day of December, A. D. 1870, in accordance with the provisions of an act of the general assembly of the State of Illinois to incorporate and to govern fire, marine, and inland navigation insurance companies doing business in the State of Illinois, approved March 11, 1869, and statement shows that said company is possessed of the requisite amount of capital invested so required by law. Authority is therefore given to the above-named company to transact its appropriate business of fire insurance in this State, in accordance with the laws thereof, until the 31st day of January, A. D. 1872. I further certify that J. B. Crawford, of Dixon, is hereby authorized as an agent to transact business according to law for said company.

In testimony whereof I have hereunto set my hand and affixed my seal of office, at Springfield, the day and year above within.

[SEAL.] C. E. LIPPINCOTT,
Auditor of Public Accounts.

164 Plaintiff next offers in evidence petition in bankruptcy and rule of court ordering cause to be shown, to which defendant objects, on the ground of its being irrelevant, incompetent, and immaterial. Objection overruled by the court, to which defendant excepts.

Rule to show cause.

In the district court of the United States for the northern district of Illinois.

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, OF CHICAGO. } In bankruptcy.

Against whom a petition for an adjudication of bankruptcy has been filed.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Upon filing proofs sustaining the allegation of the petition aforesaid, it is ordered that the said The Great Western Insurance Company, of Chicago, do appear at this court as a court of bankruptcy, to be holden at Chicago, in the county of Cook, in the district aforesaid, on the 27th day of January, A. D. 1872, at 11 o'clock a. m., and show cause, if any there be, why the prayer of said petition should not be granted.

And it is further ordered that a copy of said petition, together with a copy of this order, be served on said The Great Western Insurance Company, of Chicago, by delivering the same to it personally, and if personal service cannot be had upon it, then by leaving the same at its last usual place of abode in said district, and by publishing in the Chicago daily Evening Journal notice of this order at least five previous to the day herein required for his appearance.

165 Witness the honorable Henry W. Blodgett, judge of said court, and the seal thereof, at Chicago, in said district, on the 17th day of January, A. D. 1872.

[SEAL.]

WM. H. BRADLEY,
Clerk of District Court for said Dist.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I served a true and complete copy of the foregoing order, and also of the paper-writing hereto attached, including the certificate of Wm. H. Bradley, esq., clerk of the district court of the United States, thereto appended, upon the Great Western Insurance Company, of Chicago, therein named, by delivering the same to R. G. Waters, the vice-president of said company, on the 17th day of January, A. D. 1870, the president thereof being absent from said district.

B. H. CAMPBELL,
U. S. Marshal,
By S. H. TOURCLOTH,
Deputy.

To the honorable Henry W. Blodgett, judge of the district court of the U. S. for the northern district of Illinois:

The petition of Richard M. Hooley, of the city of Chicago, in the county of Cook and State of Illinois, respectfully shows that he is a creditor of the Great Western Insurance Company, of Chicago, a corporation created by and existing under the laws of the State of Illinois, and located and having its principal office for doing business at the city

166 of Chicago, in said State, who, for a period of six months next preceeding the date of the filing of the petition, has resided and

carried on business at Chicago, in the county of Cook and State of Illinois, in the district aforesaid; that your petitioner demand provable against the said debtor, in accordance with the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867; that your petitioners believe that said debtor owes debts to an amount exceeding the sum of three hundred dollars; that your petitioners' demand exceeds the amount of two hundred and fifty dollars, and that its nature is as follows: A demand and debt for the sum of forty-five hundred dollars for losses suffered by your petitioner in the fire of Oct. 9, 1871, being upon two policies issued by said company to your petitioners, dated respectively January 19, 1871, and August 6, 1871, the first of said policies being numbered 51695, and running from January 5th, 1871, to January 5th, 1872, at noon, and insuring your petitioner against loss or damage by fire to the amount of twenty-four hundred dollars on improvements contained in Hooley's Opera House, consisting of stage scenery, proscenium, gas and water pipes and fixtures, seats, chandeliers, furniture and fixtures, fresco painting and ornaments, all contained in Hooley's Opera House, known as No. 89 S. Clark st., Chicago, Illinois; the second of said policies being numbered 20637, and running from Aug. 6th, 1871, to August 6th, 1872, at noon, and insuring your petitioner against loss or damage to the amount of five
167 thousand dollars on his four-story and basement brick building situate on the east side of, and known as, No. 87 S. Clark st., Chicago, Illinois.

That on or about the first day of November, 1871, due proof of loss, as required by said policies, were made by your petitioner to said company, and on the 14th day of November, 1871, said proofs of loss were duly accepted and adjusted by said company, and said sums became due and payable by the terms of said policies in sixty days thereafter, to wit, on the 14th day of January, 1872; and your petitioner further represents that within the six calender month' next preceeding the date of this petition, the said The Great Western Insurance Company of Chicago, at the district aforesaid, did com'it an act of bankruptcy within the meaning of said act, to wit, in that it did heretofore, to, on the 15th day of December, A. D. 1871, being insolvent, made to Charles Kern, of Chicago, in the county of Cook and State of Illinois, a payment of money, to wit, four hundred dollars, with intent to give a preference to said Charles Kern, who was then and there a creditor of said The Great Western Insurance Company of Chicago, and with the intent to defeat and delay the operation of said act. Your petitioner further shows that said The Great Western Insurance Company of Chicago is admitted by its officers and agents to be now, and to have been for some time, insolvent and unable to pay its liabilities as they accrue, but that its officers are striving to continue the existence in business by said company by delaying payments to creditors until they can receive the money from premiums and assessments; that as
168 fast as sufficient funds are realized from premiums and assessments, they are paying claims due, sometimes in full and sometimes on a percentage; that they have settled with many others besides said Kern, whose names are unknown to your petitioner; that it is apparent that if such a state of things continue to exist some of the creditors will receive eventually little or nothing, while others will be paid nearly or quite in full; that such a state of things is calculated to greatly defeat the operation of the bankrupt act; that the moneys received and to be received from such premiums and assessments are wholly inade-

quate to pay the whole or any considerable portion of the debts of said company.

Wherefore your petitioner prays that the said Great Western Insurance Company of Chicago may be declared a bankrupt, and that a warrant may be issued to take possession of its estate; that the same may be distributed according to law, and that such further proceedings may be had thereon as the law in such case provided.

Dated January 17, 1872.

RICHARD M. HOOLEY,
Petitioner.

By S. M. MILLAR.

BURNETT, BURNETT, ATHNAN & DAVIS, AND S. M. MILLIARD,
Attorneys for Petitioner.

That the usual injunction be issued in restraint of said debts, as provided by the fortieth section of said act, and a warrant to the marshal to forthwith take possession provisionally of all the property and effects of the said debtor and safely keep the same until the further order of the court.

169 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, S. M. Milliard, agent and attorney, one of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by me on behalf of Richard M. Hooley, are true so far as the same are stated of my own knowledge, and that those matters that are stated therein on information and belief are true according to the best of my knowledge, information, and belief.

S. M. MILLARD.

Subscribed and sworn to before me this 17th day of January, A. D. 1872.

E. A. DRUMMOND,
U. S. Com'r N. D. Ill's.

(Endorsed:) Filed Jan'y 17th, A. D. 1872, at 10½ o'clock a. m. Wm. H. Bradley, cl'k.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the petition in the matter of the Great Western Insurance Company of Chicago, in bankruptcy, as appears from the original, now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 17th day of January, A. D. 1872.

WM. H. BRADLEY, *Clerk.*

[U. S. 5c. rev. stamp, cancelled.]

170 (Endorsed:) Filed January 18, 1872. Wm. H. Bradley, clerk.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, hereby certify the above and

foregoing to be a true and correct copy of the rule to show cause, with marshal's return and copy of petition attached, in the matter of the Great Western Insurance Company of Chicago, in bankruptcy, as appears from the originals now in my custody.

In testimony whereof I have hereunto set my hand and affixed the the seal of said court, at my office in Chicago, in said district, this 22d day of April, A. D. 1876.

[SEAL.] WM. H. BRADLEY, *Clerk.*

In the district court of the United States for the northern district of Illinois.

THURSDAY, *April* 14, *A. D.* 1872.

Present, Hon. Henry W. Blodgett, judge.

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY OF CHICAGO, BANKRUPT. } In bankruptcy.

It appearing to the court, from the certificate of H. N. Hibbard, esq., the register to whom said matter was referred, that the creditors attending the creditors' meeting herein, on the 8th day of April, A. D. 1872, before said register failed to elect an assignee of said bankrupt's
171 estate, and said register having certified said matter to this court for its action in the premises, it is ordered that C. W. Upton of Chicago be, and he is hereby, appointed assignee of the estate of said bankrupt, and vested with all the rights and powers of assignees in similar cases.

NORTHERN DISTRICT OF ILLINOIS:

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order of record in said court on the eleventh day of April, A. D. 1871, in the matter of the Great Western Insurance Company of Chicago, in bankruptcy, as appears from the records now in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this twenty-second day of Ap'l, A. D. 1876.

[SEAL.] WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, do hereby certify that Wm. H. Bradley, whose name appears subscribed to the foregoing certificates, is, and was at the date of subscribing the same, clerk of said court, duly appointed and qualified; that his said certifi-
172 cate' are in due form of law, and that said signature purporting to be are his genuine signatures.

Witness my hand at Chicago this 22' day of April, A. D. 1876.

H. W. BLODGETT,
District Judge, Nor. Dist. Ills.

NORTHERN DISTRICT OF ILLINOIS, *ss:*.

I, Wm. H. Bradley, clerk of the district court of the United States for the northern district of Illinois, do hereby certify that I am well ac-

quainted with the handwriting of Hon. Henry W. Blodgett, whose name is subscribed to the foregoing certificate, and that the same is his genuine signature, and that he was at the time of signing the same, and is now, district and duly appointed, qualified, & commissioned, and that as such full faith and credit are and of right ought to be given to all his official acts.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at my office in Chicago, in said district, this 22d day of April, A. D. 1876.

[SEAL.] WM. H. BRADLEY, *Clerk.*

The plaintiff next offers in evidence a certified copy of adjudication in bankruptcy, to which the defendant objects, on the grounds of its being immaterial, irrelevant, and incompetent; objection overruled,
173 to which the defendant excepts. Here follows the certified copy, in words and figures as follows, to wit:

In the district court of the United States for the northern district of Illinois.

TUESDAY, *February 6th, A. D.* 1872.

Present, the honorable Henry W. Blodgett, judge.

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, OF CHICAGO, BANKRUPT. } In bankruptcy.

This cause coming on this day to be heard, now comes the petitioner, Richard M. Hooley, by Bennett, Bentley, Ullman and Ives, and S. M. Millard, his attorneys, and the said The Great Western Insurance Company failing to appear in answer to the order to show cause on creditors' petition heretofore entered herein, and it now, three times solemnly called, comes not but makes default. It is therefore considered by the court that its default entered, and thereupon and upon consideration of the proofs in said cause it was found that the facts set forth in said petition were true, and it is therefore adjudged that the said The Great Western Insurance Company, of Chicago became bankrupt within the true intent and meaning of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, before the filing of the said petition, and it is
174 therefore declared and adjudged bankrupt accordingly, and it is further ordered that the said bankrupt shall, within five days after the service of a copy of this order upon it, made and deliver or transmit by mail, post-paid, to the marshal, as messenger, a schedule of its creditors and inventory of its estate in the same form and verified in the manner required of the petitioning debtor by the said act.

And it is further ordered that a warrant of seizure issue herein, returnable before H. N. Hibbard, esq., one of the registers in bankruptcy of this court, to whom this matter is hereby referred on the 6th day of March, A. D. 1872, at 11 o'clock a. m.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradly, clerk of the district court of the United States for said district, do hereby certify the above and foregoing to be a true and correct copy of the order of adjudication entered of record in said court on the 6th day of February, A. D. 1873, in the matter of the Great

Western Insurance Company, of Chicago, in bankruptcy, as appears from the records now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 22d day of April, A. D. 1876.

[SEAL.] WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

175 I, Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, do hereby certify that Wm. H. Bradley, whose name appears subscribed to the foregoing certificate, is, and was at the date of subscribing the same, clerk of said court, duly appointed and qualified; that his said certificate is in due form of law and the said signature purporting to be his is his genuine signature.

Witness my hand, at Chicago, this 22nd day of April, A. D. 1876.

H. W. BLODGETT,
Dist. Judge, Nor. Dist. Ill's.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for the northern district of Illinois, do hereby certify that I am well acquainted with the handwriting of Hon. Henry W. Blodgett, whose name is subscribed to the foregoing certificate, and that the same is his genuine signature, and that he was at the time of signing the same and is now district judge of the United States for said northern district, duly appointed, qualified, and commissioned, and that as such full faith and credit are and of right ought to be given to all his official acts.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at my office in Chicago, in said district, this 22d day of April, A. D. 1876.

WM. H. BRADLY, *Clerk.*

176 Plaintiff next offers in evidence the notification of appointment of assignee and his acceptance of the appointment, to which the defendant objects on the grounds of its being incompetent, immaterial, and irrelevant; objection overruled by the court, to which the defendant excepts.

Notification of appointment of assignee.

In the district court of the United States for the northern district of Illinois.

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, OF CHICAGO, BANKRUPT. } In bankruptcy.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

To Clark W. Upton, of Chicago, in the county of Cook and State of Illinois:

I do hereby certify to you that you were duly appointed assignee of the estate and effects of the above-named bankrupts, on the 11th day of Ap'l, A. D. 1873, by the court by special order entered of record this

day; and, further, that *that* you are hereby required forthwith to notify the undersigned, a register in bankruptcy of the district aforesaid, of your acceptance or rejection of the said trust.

Dated at Chicago the eleventh day of April, A. D. 1873.

H. W. HIBBARD,
Register in Bankruptcy.

To whom it may concern:

177 Be it known that I hereby signify my acceptance of the trust of assignee of the estate of the above-named bankrupt this 11th day of April, A. D. 1873.

C. W. UPTON,
Assignee.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the notice of appointment to Clark W. Upton, assignee of the Great Western Insurance Company, of Chicago, in bankruptcy, as appears from the original now in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 22nd day of April, A. D. 1876.

[SEAL.] WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, do hereby certify that Wm. H. Bradley, whose name appears subscribed to the foregoing certificate, is, and was at the date of subscribing the same, clerk of said court, duly appointed and qualified; that his said certificates are in due form

178 of law, and that the said signature purporting to be is his genuine signature.

Witness my hand, at Chicago, this 22nd day of April, A. D. 1876.

H. W. BLODGETT,
Dist. Judge, Nor. Dist. Ill's.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for the northern district of Illinois, do hereby certify that I am well acquainted with the handwriting of Hon. Henry W. Blodgett, whose name is subscribed to the foregoing certificate, and that the same is his genuine signature, and that he was at the time of signing the same, and is now, district judge of the United States for said northern district, duly appointed, qualified, and commissioned, and that as such full faith and credit are and of right ought to be given to all his official acts.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at my office in Chicago, in said district, this 22nd day of April, A. D. 1876.

[SEAL.] WM. H. BRADLEY, *Clerk.*

The plaintiff next offers in evidence a deed of conveyance to the assignee, to which the defendant objects on the ground of its

179 being incompetent, irrelevant, and immaterial. Objection overruled by the court, to which the defendant excepts.

Assignment of bankrupt's effects.

In the district court of the United States for the northern district of Illinois.

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY OF CHICAGO. } In bankruptcy.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Know all men by these presents, that Clark W. Upton, of Chicago, in the county of Cook and State of Illinois, in said district, has been duly appointed assignee in said matter. Now, therefore, I, Homer N. Hibbard, one of the registers of said court in bankruptcy, by virtue of the authority vested in me by the 14th section of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, do hereby convey and assign to the said Clark W. Upton, assignee, as aforesaid, all the estate, real and personal, of the Great Western Insurance Co., of Chicago, bankrupt, aforesaid, including all the property of whatever kind of which it is possessed or in which it was interested or entitled to have, on the sixth day of February, A. D. 1872, with all its deeds, books, and papers relating thereto, excepting such property as is exempt from the operation of this assignment by the provisions of the said 14th section of said acts; to have and hold all the foregoing premises to the said Clark W. Upton and his heirs forever. In trust, nevertheless,
180 for the use and purposes, with the powers and subject to the conditions and limitations set forth in said act.

In witness whereof I, the said register, have hereunto set my hand and caused the seal of said court to be affixed, this eleventh day of April, A. D. 1873.

[SEAL.]

H. N. HIBBARD,
Register in Bankruptcy.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the deed of assignment to Clark W. Upton, assignee of the Great Western Insurance Company, of Chicago, in bankruptcy, as appears from the original now in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in said district, this 22d day of April, A. D. 1876.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois, do hereby certify that Wm. H. Bradley, whose name appears subscribed to the foregoing certificate, is, and was at the date of subscribing the same, clerk of said
181 court, duly appointed and qualified; that his said certificate is in due form of law, and the said signature purporting to be his genuine signature.

Witness my hand at Chicago, this 22nd day Ap'l, 1876.

H. W. BLODGETT,
Dist. Judge, Nor. Dist. Ill's.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the dist. court of the United States for the northern dist. of Ill's, do hereby certify that I am well acquainted with the handwriting of Hon. Henry W. Blodgett, whose name is subscribed to the foregoing certificate, and that the same is his genuine signature, and that he was at the time of signing the same, and is now, dist. judge of the United States for said northern district, duly appointed, qualified, and commissioned, and that as such full faith and credit are, and of right ought to be, given to all his official acts.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at my office in Chicago, in said district, this 22d day of April, A. D. 1876.

WM. H. BRADLEY, *Clerk.*

Plaintiff next offers in evidence the application of the assignee to court for call on stockholders, for balance due on stock subscribed and order of court, to which the defendant objects, on the ground of
182 its being incompetent, irrelevant, and immaterial. Objection overruled by the court; defendant excepts.

In the district court of the United States for the northern district of Illinois.

FRIDAY, *July* 5, 1873.

Present, the Hon. Henry W. Blodgett, judge.

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, OF CHICAGO, BANKRUPT. } In bankruptcy.

And now on this day comes C. W. Upton, assignee of the estate of said bankrupt, and makes application to this court, showing ing that a large amount of the capital stock of the said bankrupt remains unpaid, in part; that the whole amount of such capital stock will be required to be paid in order to meet the demands now due from and proven against the estate of said bankrupt, and upon investigation of the facts in the matter, and the court being fully advised in the premises, it is ordered that the entire amount unpaid on the capital stock of the said bankrupt be paid to said assignee on or before the 15th day of August, A. D. 1872, at his office, in Chicago, Illinois, and in default thereof, the said assignee proceed to collect the same. It is further ordered that notice of this call be given to the stockholders of the said bankrupt, so far as known, without unreasonable delay by publication or otherwise.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

183 I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify that I have carefully compared the above and foregoing with the original order of adjudication of said court, entered of record on the 6th day of March, A. D. 1872, the notification of appointment of assignee, the deed of assignment of bankrupt's effects, and the order of said *said* court, entered of record on the 5th day of July, A. D. 1872, as appears from their respective originals now in my custody, in said matter of the Great Western Insurance Company, of Chicago, and that the same are true and correct copies of said originals, and the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said district court, at Chicago, in said district, this 20th day of October, A. D. 1873.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, do hereby certify that Wm. H. Bradley, whose name appears subscribed to the foregoing certificate, is, and was at the date of subscribing the same, clerk of said court, duly appointed and qualified; that his said certificate is in due form of law, and the said signature purporting to be his is his genuine signature.

Witness my hand at Chicago, this 20th day of October, A. D. 1873.

H. W. BLODGETT,
U. S. Dist. Judge, Nor. Dist. Ill's.

184 NORTHERN DISTRICT OF ILLINOIS:

I, William H. Bradley, clerk of the district court of the United States for the northern district of Illinois, do hereby certify that I am well acquainted with the handwriting of Hon. Henry W. Blodgett, whose name is subscribed to the foregoing certificate, and that the same is his genuine signature, and that he was, at the time of signing the same, and is now, district judge of the United States for said norther' district, duly appointed, qualified, and commissioned, and that as such full faith and credit are and of right ought to be given to all his official *his official* acts.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court at my office in Chicago in said district this 20th day of October, A. D. 1873.

[SEAL.] WM. H. BRADLEY, *Clerk.*

J. K. PHILO sworn:

I have examined and compared all of the copies offered and numbered from 1 to 9, inclusive, with the originals in the office of the secretary of state of Illinois, and those of the bankrupt court examined and compared with the original in bankrupt court; also No. 7 and 5 and 6 & 4; No. 3 examined in office, and public accounts with original on file; No. 2, with original on file in secretary of state, and both No. 1 same examination; 3½ found no record to compare with, but found an order to base it on.

185 Cross-examined:

I made the examination in the auditor's office, and the auditor detailed a clerk to assist me after finding original, the copies being already made; the clerks read the originals, and I followed reading the copies. I took pains to make personal examination of all the figures in the statement of the condition of the company.

The papers from office of secretary of state was made in same way as to papers from bankrupt court made comparison in same way, except that clerk read copies, and I followed reading originals. I have now stated all facts in relation to examination of these documents with the originals.

B. G. GARDNER sworn:

Reside in Cook County, Illinois; and in 1872 was in employ of assignee Great Western Insurance Company in July, 1872.

Recognize Doc. 9; was put in Chicago Daily Inter-Ocean one day; was paper of general circulation in city of Chicago. Witness shown No. 10. I procured this order to be printed. I wrote in the name of each stockholder in the blank, as shown by the book, and also their address, as shown by the book of Great Western Insurance Company, and put them in envelopes directed correspondingly, closed them and put them in the mail myself post-paid.

I directed one, T. A. Kent, esq., Cheyenne, Wyoming Territory.

186 Cross-examined:

Don't know how many impressions of Inter-Ocean had notice; saw about half dozen impressions of that issue and saw notice in two of them. I had instructions to send such notice to each stockholder, but have no independent recollection of sending such to this defendant.

Pl'ff offers in evidence Doc. 10, under same condition as the other nine were offered.

Adjourned until 9 o'clock a. m.

T. A. KENT, sworn:

Reside in Cheyenne; am defendant; was at one time employed by Great Western Insurance Company; home office was in Chicago, Illinois. Mr. Stewart was president of company, and Hooker was secretary; I acted as agent of the company—agency contin'ed from about the 20th May, 1871, until about August 15th, 1872. There was a branch of company located here; I was one of the officers of the branch; I have not the records of the branch. There was no records. The meetings were informal. Have policy record and applications for policies (shown pamphlet). Don't recollect seeing this before (shown circular, Cheyenne branch). Have seen this before in Cheyenne, (offered in evidence, submitted same as other documents). I procured some of the subscriptions to stock; some was procured by Major Wooley; some by Pierce and Long. Have not in my possession either of the original subscription lists. Have a copy of subscription list of stock-
187 holders of branch (offers in evidence No. 12, submitted to same exceptions as other documents).

I do not know where the original is; it was in Chicago, and was lost in the fire. I know this by a letter from C. W. Upton. There was no other paper published than the circular by this branch showing condition of company. Did not return any original subscription list of subscriptions obtained by me to the company at Chicago. I was a stockholder in the company in the way I disclose in my answer (shows certificate of stock). I did not receive stock at the time it bears date but afterwards. I subscribed for part of this stock, part was transferred to me at Chicago. It was subscribed for by Joslin and Parks (certificates offered in evidence, No. 13 & 14 submitted to same objections as other documents).

There was a bond accompanying each certificate of stock which the stockholders signed; paid one payment upon it. The stockholders received certificate of stock, and the bond I forwarded to the company at Chicago.

The bond represented the entire amount of the capital stock in certificate and the proportion of 20 % *per cent.* I have paid on these two certificates, 20 shares, $800, according to contract prior to bankruptcy; paid Great Western Ins. Company on these shares stock. (Copy bond offered No. 15,) (shown letters from 1 to 12, with exhibits except one signed T. J.,

recognized) offered in evidence subject to objection for relevancy,
188 letter of Upton, No. 17, offered.

Cross-examined:

Was not subject for certificate No. 2432; Joslin and Park were subject for it. I bought it from Joslin and Park on representations of Major Long. I received a transfer of certificate like this on back from Joslin and Park. In subscribing for my own stock I told H. A. Pierce and T. W. J. Long, I would take ten shares of the stock upon the representations that they made to me. They showed me blank bonds like that, but did not sign it at that time; afterwards a certificate of stock and blank bonds came from Chicago; I signed the bonds, paid $50, and I received certificate of stock. I don't think I subscribed for stock in any other way. Long at all the times mentioned was recognized as the special agent of the Great Western Insurance Company. H. A. Pierce at all the times mentioned was working with Long on a salary, and was first manager and recognized as agent of company. This up to sometime in March or April, 1871. I had been acting by direction of Long previous to receipt of certificate, and my action was afterward recognized by company. Can't say how Joslin & Park subscribed for stock; can't say they subscribed at all. Pierce was manager at the time they subscribed. They were solicited by Long, Pierce, Arnold, Wooley, and myself.

189 This copy was sent out from Chicago by Hooker. Don't know whether it is a copy or not; I don't think I ever subscribed any such paper. Don't know that there was an original. Never made any comparison of this pretended copy with what purported to be an original. Can't swear that there was such an original. The circular No. 11, was permitted some considerable time after branch was organized in 1871.

I understood that the branch was a distinct corporation at the time it was organized. It did not have a capital of $1,000,000. I was authorized by company to obtain insurance. I had authority from Thos. W. J. Long, special agent of Great Western Insurance Company, to transact business, to prosecute H. A. Pierce, to obtain books of the company, and authority to contract and pay bills. (Here shown letters marked A, B, & C, identified.) Recollect strug'le with Pierce for books and papers of Great Western Insurance Company. Pierce had them originally. I received instructions from company to get possession of them; were obtained on search warrant from E. P. Johnson and Pierce, and they were afterwards shipped out of the country. I have possession of policy record and applications for insurance. I have not any other books or papers. When I received Upton's letter I forwarded package papers to him containing list supposed stockholders; might have been a book to a certain extent.

I paid company on certificate of stock assigned by Joslin &
190 Park nothing. They paid the company $400 on it. I bought the stock of them. On the other certificate I paid $400. ℵ 1878. Long and Co. represented to me after the fire that $200 more was necessary to put company on substantial footing. That a meeting of the stockholders was held in Chicago after the fire, and it was concluded that if each stockholder would pay the same amount already paid, the company could pay all its losses, and an assessment of $20 a share was made by them, and it issued circulars to this effect. He also represented that this $20 a share would place the company in a better condition than it was before the fire, and that this would be a good cheap adver-

tisement for the company, and I paid it, so did Joslin and Park pay $200.

Adjourned until 2 p. m.

Kent's cross-examination resumed.

Witness asked to state all the circumstances connected with the payment of this last $200.

(Objected to by plaintiff as immaterial or irrelevant. Argued and taken under advisement. Adjourned until to-morrow, Dec. 8th. Objection overruled.)

Kent's cross-examination continued:

The company represented to me through Long that if the stockholders would pay this $20 additional on each share it would place the company in the same condition that it was before the fire; in fact, that the fire would only be a good advertisement for the company; that the
191 Great Western would be one of the few companies which would pay all its losses; in fact, at the end of the year so far as the capital of the company was concerned, the stockholders of the Great Western Insurance Company would never know that there had been a fire. That it would be considered one of the leading companies in the country, and that by paying the $200 that I might either consider it a gift to the company or to the unfortunate of Chicago. I paid this second $200 in consequence of those representations. I relied upon them, and believed them to be true. Thomas W. J. Long and H. A. Pierce induced me to make original subscription spoken of by me. Long was special agent of company at that time. He did make representations to me. He said that 10 shares in that fire insurance company would sell for $200. I told him I would have no stock business in mine unless I could control stock. That the big fish always eat up the small fish, and didn't think I wanted any of it in mine. He said this company was different from other fire insurance companies on the plan of doing business; that it was on the most secure plan both to stockholders and policy-holders that there was in the world; we would have one home office in Chicago; do not appoint agents to take risks like other companies, that under no consideration do we have an agent only where
192 we have a branch office.

To constitute a branch office we sell stock in the town to parties living in the town, and they organize and appoint a president and secretary, and these two appoint an agent for the company, and he must be a stockholder, and by this means stockholders at different branches look out for the interest of the company and see that agents do not take poor risks. He said on this basis with stockholders, where we have agents it isn't possible to be on a better basis.

He also stated you cou'ted that I couldn't buy a dollar's worth of our stock on market; that it can only be got in this way. Every dollar's worth of our stock can be sold in Chicago is now taken. That I could not buy it from the home office for any consideration; that as Cheyenne was capital of the Territory at this time, home office, through H. A. Pierce' recommendation, had applied to it $50,000 of stock. I asked him if it was possible in any event to assess the stock, and he then produced the bond and said that it was impossible in any event to be compelled to pay more than what the bond called for. I asked him in case the company required more capital in what way it would be able to raise it.

He said to call meeting of stockholders, vote more stock, and
193 apply it to each of the branches which were scattered in almost every State and Territory in the Union. He then showed me a blank bond, which I read, and told me that was the form for all stockholders to sign; that on the back were blank receipts after the money was paid to spread them thereon.

That when all the payments were made on the within bond it would be returned with ten shares capital stock if I would pay $50, and $50 in 3 months, $50 in six months, and $50 in nine months; and that in case I was not able to pay at any time that my payments were due, the company would charge 10 % per annum per am't. I told him that if I was held responsible for any more than $200, I wouldn't touch it. He then held the bond up and said you might just as well say that if I was to sell you a purse for $100 that I could compel you to pay $200, there, on the face of the bond, are the words, non-assessable. No company in in the world can go back on that; anybody knows that he could not be compelled by law or anything else more than he contracts for, and that in writing. He stepped out of my store and was gone half an hour, when he came back and says—Kent you are just the class of man that the company wants to represent this company; we want try and get as good a class of stockholders as possible in this community in order to give the com-
194 pany credit. I told him that I had stock enough of other kinds to satisfy me. Then he said this is one of the best investments that a man could possibly make. That it was not gotten up just for the purpose of selling, or, as he termed it, a stock-jobbing institution, but a safe, non-assessable institution under any circumstances. He also said that this company would benefit your town, and loan a portion of its capital stock in Cheyenne. Any stockholder, after the organization of the branch office, by making application at one of the meetings for loan of money, on first-class real estate security, on the recommendation of the stockholders and president of the branch office, they would loan the sum to the party who made application. He said that thing alone would help you a little in your town, and the money you invest with this company you will see invested here in substantial improvements, and that alone ought to be encouragement enough for you to make the investment.

He said that in Iowa, Illinois, Minn., Kentucky, Wis., and the other States where they had branch offices the company had, on recommendation of the president and stockholders of the branch, in their particular locations, loaned thousands of dollars.

195 I told him we had no real estate securities here; that the railroad company had never received patent for land, and that until they did it would be impossible for the Great Western Insurance Company to benefit Cheyenne. He then pointed to Joslin and Park' store, and said on that property the company would loan money. He said that if it was shown to the company the condition by which they held property, that he knew that they would loan a reasonable amount on it. I told him at that time, under those representations, I would give the matter further thought. He then said he wished to organize a branch office here in the mining country, and we want your name. I told him I would see. In the course of the evening he dropped into my store again, and told me that he had received encouragement from some of the most influential citizens that they had thought the matter over, would take some stock and organize with them in the morning. He then said that he did not see why business men would require to think about a trifle like that so long; that the very fact alone that the Great West-

ern Insurance Company loaning its capital stock in Cheyenne at a low rate of interest on first-class improvements ought to be guarantee enough with the basis on which it done business for any man
196 who had the advancement of the city at heart to make the investment. He said you are business man enough to know that every dollar piled up in brick and stone in your city is an actual benefit to every citizen who has property in your community. He then said that after this branch is organized, that if any good responsible stockholder in your community presents an application for money upon first-class security, recommended by stockholders and endorsed by the president of branch, I shall recommend it and state to them the condition of property here in Cheyenne, and have no doubt in my mind, and I think I may say beyond a doubt, the company will take my judgment, as they have done at sundry times before, and loan a part of their funds in your community. He went away and returned in the morning about 8 o'clock, and said he had succeeded first-rate, and placed some stock among your business men. I told him I was too busy to talk with him, and he then said he was going down to talk with A. R. Converse & Gov. Campbell. I had occasion to go to Converse's store, and there met Long and Pierce. Mr. Converse's man had occasion to go the cellar to get goods that I required, and Long and Pierce both talked to me, and wanted to know my object for not taking some stock in Great Western Insurance Company. Long said, "Kent, it
197 will do you good." I told him if I could see where I would derive any benefit I might invest. He said why the very loaning of money in your community at an unusually low rate of % would benefit you; also that the stock was non-assessable under any consideration; that you would only pay what you gave a bond for ought to be inducement enough for any business man to invest. I took the goods and started to walk out of store, and Long says, "Kent, you don't want to walk off like that." I went down to my store, and in about an hour Long and Pierce came in and mentioned over a list of names that they claimed would take stock, and they thought that I had better try a little of it, if I didn't take more than 5 shares, as they wanted my subscription. I told them so far as the shares was concerned I would just as soon have 10 as five, if I was convinced it was all right. Pierce said he was going over to Joslin and Park's, and he would be back again in a minute. He went over there and returned in about five minutes. Pierce and Long commenced talking about company, held out the same inducement about non-assessibility of stock and loaning of money, and I told them I would take 10 shares. They then asked me to go with them to Joslin & Parks. On the way we saw Mr. M. A. Arnold. Long said there is one of our stockholders. They called him, and he went with us to
198 Joslin and Parks. Joslin was either not in or was busy, and I returned to my store, and in about 5 minutes Joslin stepped in and says: "Kent, you have given this more thought than I have." I said to Joslin: "This, I think, is a good thing. I have taken 10 shares under the representation of Long that the stock is non-assessable, and that the company will loan money here at a low rate of interest, which will benefit us all," and that "if I did not think it was a good thing I would not invest." Mr. Joslin went out of the store; was out about 5 minutes. Long & Pierce returned and said: "We have secured Joslin and Parks' subscription," and that "in half an hour we will meet at the court-house." And then they went out. I went to the court-house and there I found Long and Pierce, Cortis and Arnold, J. Joslin, D.

McLaughlin, Geo. D. Foglesong, J. D. Wooley, and one or two other gentlemen. Long called the meeting to order, and said it was necessary to appoint chairman and secretary. Chairman and secretary were appointed. Long got up and stated the object of the meeting, and the secretary called the roll of names of parties who had subscribed for stock, and they walked up one by one as their names were called and made first payments on the stock and received a receipt, and then they organized a branch office, appointed as president and secretary, and board of directors.

199 Then Long got up and explained the object of the company placing its stock in this way, and the material benefit that it would derive from company loaning money in this community. The question was asked of Long if it was a possible thing for the stock to be assessed. He said: "Certainly not, sir; it is an impossibility. You are holding for face of your bond." He then went on to state how the business of the branch office should be carried on. When I speak of bond I mean the same as was read to me yesterday and referred to by me in my testimony (marked 15). I believed these representations of Long, or I would not have bought the stock. I learned to the contrary after the Chicago fire, from Church Howe. This was after I had paid my second $200; some time in August or September, 1872. I think I received a letter from Church Howe, from Chicago. Paid second $200 Nov. 28, 1871. Know the form of Joslin and Parks' bond. It was just the same form at the one I signed. The am't in the blank was $200.

(Blank bond shown witness, filled out and marked 18.)

Re-examination:

These receipts shown by me are for moneys paid on stock standing in my name and that of Joslin and Park received by me at
200 about this date. I received these receipts from the home office.

(Plaintiff offers receipts in evidence.)

I do not remember having read any notice of a meeting of stockholders to make an assessment. I do remember seeing a notice of an assessment having been made. Long told me about assessment. Remember receiving circular about 10 days after Long told me this, advising me about this assessment of $20 a share. I believe I saw circular like this (shown circular). Do not know that it was just like this. Sent one of the kind to each stockholder of branch by mail. Saw one with Geo. T. Price afterwards. Don't remember who else. Have more in my possession now.

Adjourned until 2 o'clock.

Kent. Re-examination:

Have made examination and do not find any copy of such notice now in my possession. I did not have notice of assessment sent to me. To the best of my knowledge a meeting of stockholders had been held in Chicago; that the stockholders in Chicago had agreed to make a levey or assessment of 20 % on the stock. Do not remember the time at which meeting was held. I think notice stated that the payment of assessment would place company in a condition to pay all its losses, or words to that effect; and this was received before I paid the
201 last $200, which was paid within the time requested in the circular. Long was supposed to reside in Cheyenne prior to soliciting subscriptions. He was the special agent of the company and acting for the company issuing policies. I have letters from Hooker, sec-

retary of , that led me to suppose that H. A. Pierce was agent for the company. He (Pierce) had a sign out on front of his office: Great Western Insurance Company. Can't state how long Pierce was agent for company. Pierce came here with Lee, secretary of Territory, in the early part of 1869. Don't remember that he started a paper before this, nor met him until I met him with Long. I was substantially instructed by home office to have him. I do not know at that time where Long resided; know that Long claimed to reside in Iowa. I believe he claimed to have resided in Chicago in former years. I first met Mr. Long, I think, on the street, or in my store, and was introduced to him by Pierce. I suppose that I have repeated Long's representation to me at least a thousand times. I bought Joslin and Park's stock, believing that they subscribed for it on my representation to them. Pierce was secretary of meeting and called names of stockholders at meeting at court-house. Think Geo. D. Foglesong was chairman. D. McLaughlin was *was* chosen president of
202 branch. Secretary, Geo. D. Foglesong, Henry Housman, W. R. Street, and T. A. Kent. They are holding office yet, I think, so far as I know.

The first intimation I had of any doubt about the company was in a letter from Church Howe.

Mr. P. G. Gardner recalled:

Was bookkeeper of defendant from about May 20, 1871, up to and after its bankruptcy; am acquainted with handwriting of this list of stockholders; it was prepared from book called "stock ledger." It is in handwriting of W. T. Morris, clerk in company, in my department and under my control. I know it is a correct copy of the list of the stockholders. The stock-book was burned up in the fire of 1871.

(Ex. on voir dire.)

I neither made up the original stock ledger nor did I assist in making it up. It was made up from a book used by the company. That is all I know of it. There was no other stock-book in the office of the company but the one from which this was taken. The company transacted business for about two years prior to bankruptcy. (Shown pamphlet.) Have seen one like this before. It was printed in Chicago; about 10,000 of them, I think, was generally sent to all the agencies of the company in the different States and Territorys.

(No. 19 was here offered in evidence by plaintiff, to which defendant objected. Objections overruled, & exception taken by defendant.)
203 There was an assessment made by stockholders after the fire. No record was kept of the action of examination committee.

(The plaintiff's attorney then proceeded to read the documents offered in evidence, those already made a part of this bill of exceptions, and the following. Defendant objected on the grounds of its being immaterial, incompetent, and irrelevant. Objections overruled by the court, to which defendant excepts.)

Copy of publications certified to of the above order of court authorizing assignee to collect the unpaid amount of capital stock.

This certifies that a notice, of which the annexed printed slip is a true copy, was published for one day, to wit: One time in the Tuesday edition of the Inter-Ocean, a newspaper published and printed in the city of Chicago, of general circulation throughout Cook County, and the

State of Illinois; that the date of the first paper containing the same was the 9th day of July, A. D. 1872, that the date of the last paper containing the same was the 9th day of July, A. D. 1872, and that we have received two $\frac{50}{100}$ dollars for publishing the same. Dated at Chicago, this 3d day October, 1872.

C. D. ALLEN, *Publisher.*

(Here follows the slip referred to, to which defendant objects on the ground of its being immaterial, irrelevant, and incompetent. Objection overruled, to which defendant excepts.)

OFFICE OF THE ASSIGNEE OF THE
GREAT WESTERN INSURANCE COMPANY,
204 163 *East Washington street, Chicago, July* 8, 1872.

To the stockholders of the Great Western Insurance Company, of Chicago, Illinois:

You are hereby notified that on petition filed and proofs heard in the matter of the Great Western Insurance Company, bankrupt, in the district court of the United States for the northern district of Illinois, the following order was made and entered of record in the said court on the 5th day of July, A. D. 1872, viz:

IN THE MATTER OF THE
GREAT WESTERN INSURANCE COMPANY, } In bankruptcy.
BANKRUPT.

And now on this day comes C. W. Upton, assignee of the estate of the said bankrupt, and makes application to this court showing that a large amount of the capital stock of the said bankrupt remains unpaid in part; that the whole amount of such capital stock will be required to be paid in order to meet the demands now due from and proven against the estate of said bankrupt, and upon investigation of the facts in the matter, and the court being fully advised in the premises, it is ordered that the entire amount unpaid on the capital stock of the said bankrupt be paid to said assignee on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois, and in default thereof that said assignee proceed to collect the same. It is further ordered that notice of this call be given to the stockholders of said bankrupt as far as known without unreasonable delay by publication or other-
205 wise. The holders of unpaid capital stock in said bankrupt corporation will take notice and govern themselves accordingly.

C. W. UPTON, *Assignee.*

(Next plaintiff's attorney reads copy of notice of assignee to stockholders, of which the following is a copy. Def't objects on the grounds of its being incompetent, immaterial, and irrelevant. Objection overruled, to which defendant excepts.

OFFICE OF THE ASSIGNEE OF THE
GREAT WESTERN INSURANCE COMPANY,
163 *East Washington st., Chicago, July* 8, 1872.

You are hereby notified that on petition filed and proofs had in the matter of the Great Western Insurance Company, a bankrupt, in the district court of the United States for the northern district of Illinois, the following order was made and entered of record in said court, on the 5th day of July, 1872, viz:

IN THE MATTER OF THE
GREAT WESTERN INSURANCE COMPANY, } In bankruptcy.
BANKRUPT.

And now on this day comes C. W. Upton, assignee of the estate of

said bankrupt, and make' application to this court showing that a large amount of the capital stock of the said bankrupt remains unpaid in part; that the whole amount of such capital stock will be required to be paid in order to meet the demands now due from and proven against the estate of said bankrupt, and upon investigation of the facts in the matter and the court being fully advised in the premises, it is ordered

that the entire amount unpaid on the capital stock of the said
206 bankrupt *to* be paid to said assignee on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois, and in default thereof that said assignee proceed to collect the same. It is further ordered that notice of this call be given to the stockholders of said bankrupt, so far as known, without unreasonable delay, by publication or otherwise.

The holders of the unpaid capital stock in said bankrupt corporation will please take notice and govern themselves accordingly. Under the order of said court and the action of the officers of said company prior to bankruptcy per cent. of the stock held by you now standing on the books of said bankrupt is long past due. The balance by the order of said court will become due August 15th, 1872. By a prompt remittance of the amount now due costs will be avoided.

Respectfully,

C. W. UPTON,
Assignee.

The plaintiff next offers in evidence a printed list of names purporting to be the names of stockholders at Cheyenne.

(Objected to by defendant on the grounds of its being incompetent, irrelevant, and immaterial. Objection overruled by the court, to which defendant takes exceptions.)

Here follows list of names:

Cheyenne branch, Laramie Co., Wyo. T.; Dan'l McLaughlin, president; J. D. Wooley, T. A. Kent, directors; A. W. Holden, manager.

207 *List of stockholders at Cheyenne.*

J. D. Wooley.	Col. W. B. Royal.	E. W. Crittenden.
Curtis & Arnold.	Geo. A. Prince.	Sam'l S. Summer.
D. McLaughlin.	J. W. Mason.	James Valentine.
Geo. D. Foglesong & Co.	J. A. Campbell.	E. H. Heller.
Thos. Duncan.	W. R. Steele.	H. J. Rogers.
C. H. Warren.	T. A. Kent.	Maj. J. D. Wooley.
E. Nagle.	Dan'l Curran.	E. P. Snow.
Horper & Housman.	H. A. Pierce.	Church & Bristol.
Joslin & Park.	N. W. Hibbard.	Church Howe.
Stimpson & Barnard.	Geo. F. Price.	N. A. Baker.
L. L. Tesson.	C. M. Rockafellow.	W. B. Huges.
Geo. D. Williamson.	Timothy Dyer.	
M. E. Post.	Wm. E. Hoffman.	

(Plaintiff next offers in evidence a document purporting to be a copy of the stock ledger of the Cheyenne branch of the Great Western Insurance Company, to which the defendant objects on the grounds of its being incompetent, irrelevant, and immaterial. Objection overruled by the court, to which the defendant excepts.)

208 *Statement.—Great Western Insurance Company, Central Office, Chicago—Stock Subscription.*

The amount of stock apportioned to Cheyenne, W. T., is subscription

to be confined to responsible parties in sums of $500 and $1,000 each, and on this list no subscription will be allowed for a greater sum than $.

, *Secretary.*
, *President.*

Subscription at to the capital stock of the Great Western Insurance Company of Chicago.

The terms of subscription, are as follows: $5 per share, three months from the date hereof. The balance remaining on subscription without interest.

We, the undersigned, hereby subscribe to the capital stock of the Great Western Insurance Company upon the terms & conditions as stated above in the sums set opposite our respective names.

Dated , A. D. 187 .

N. B.—The first 5 per cent. is collected on subscription of stock. When all the subscribers have paid in the 5 per cent. the whole am't is remitted to the central office either in bank draft to order of the Great Western Ins. Co. or in currency by express when the stock will be forwarded for delivery.

This list must contain the signatures of the subscribers plainly written to avoid errors in filling up certificates, & must also give the occupation or business of each subscriber as well as No. of shares, am't subscribed, No. of bond, and am't paid upon stock.

Name.	Date of certificate.	No. shares.	Am't stock.	No. of bond.	First 5 % installment.	Second 5 % installment.	Third 5 % installment.	Fourth 5 % installment.
J. D. Wooley	Feb. 6th, 1871	25	2,500	1877	Paid..	145	.....	
T. A. Kent	" " "	10	1,000	1878	Paid..	Paid..	Paid..	Paid.
Curtis and Arnold	" " "	10	1,000	1879	Paid..	50	.....	
D. McLaughlin	" " "	10	1,000	1880	Paid..	Paid..	Paid..	Paid.
Geo. D. Foglesong & Co.	" " "	10	1,000	1881	Paid..	Paid..	Paid..	
Thos. Duncan	" " "	25	2,500	1882	Paid..	Paid..	Paid..	
C. H. Warrens	" " "	10	1,000	1883	Paid..	Paid..	Paid..	
Horper & Housman	" " "	20	2,000	1886	Paid..	Paid..	.....	
Dan'l Curran	" " "	10	1,000	1887	Paid..	50	.....	
N. W. Hibbard	" " "	10	1,000	1888	Paid..	Paid..	.....	
Geo. F. Rice	" " "	10	1,000	1889	Paid..	Paid..	Paid..	
C. M. Rockafellow	" " "	10	1,000	1891	Paid..	Paid..	.....	
T. Dyer	" " "	10	1,000	1892	Paid..	Paid..	Paid..	Paid.
W. B. Huges	" 23, "	25	2,500	1900	Paid..	Paid..	Paid..	
E. W. Crittenden Thayer	" " "	10	1,000	1130	Paid..	Paid..	Paid..	
Joslin & Park	" " "	10	1,000	1890	Paid..	Paid..	Paid..	Paid.
Stimpson & Barnard	March 6, "	10	1,000	1909	Paid..	Paid..	Paid..	Paid.
L. L. Tesson	" 8, "	10	1,000	1910	Paid..	Paid..	Paid..	Paid.
Sam'l H. Summer	" " "	20	2,000	1911	Paid..	100	.....	
James Valentine	" " "	5	500	1912	Paid..	Paid..	Paid..	Paid.
Geo. D. Williamson	" " "	5	500	1913	Paid..	Paid..	Paid..	
E. H. Hellier	" " "	5	500	1914	Paid..	Paid..	Paid..	Paid.
Thos. Duncan	April 4, "	10	1,000	1918	Paid..	Paid..	.....	
Col. W. B. Royal	" " "	20	2,000	1920	Paid..	Paid..	Paid..	
Maj. J. D. Wooley	" " "	25	2,500	1921	.....	.....	.....	
Geo. F. Price	" " "	10	1,000	1922	Paid..	Paid..	Paid..	
E. H. Hillier	" " "	5	500	1923	Paid..	Paid	.....	
E. P. Snow	" " "	5	500	1924	Paid..	.....	.....	
Church & Bristol	" " "	5	500	1926	Paid..	.....	.....	
E. M. Rockafellow	" " "	10	1,000	1927	.....	.....	.....	
J. A. Campbell	" 10, "	5	500	1928	Paid..	Paid	.....	
Church Howe	" " "	5	500	1929	Paid..	Paid.	.....	
W. R. Steele	" " "	10	1,000	1930	Paid..	Paid..	.....	
N. A. Baker	" 11, "	10	1,000	1931	.....	.....	.....	
J. W. Mason	" " "	20	2,000	1932	Paid..	.....	.....	
J. H. Frants	May 16, "	10	1,000	2020	Paid..	Paid..	Paid..	
C. A. Reynolds	" " "	10	1,000	2023	Paid..	Paid..	.....	
Orin P. Stokes	" " "	5	500	2024	Paid..	Paid..	.....	
Orrin P. Stokes	June 3, "	5	500	2038	Paid..	Paid..	.....	
McFoot	" 16, "	10	1,000	1174	Paid..	Paid..	.....	
Samuel H. Fisher	" " "	25	2,500	1175	.....	.....	.....	
J. H. Frants	" 29,	5	500	.....	Paid..	Paid..	.....	

1st. Installment due on receipt of certificate.
2nd. " " 3 months from date of certificate.
3d. " " 6 " " " " "
4th. " " 9 " " " " "

Parties who have made no payments and do not desire to retain their certificates, you can return the same to this office and we will cancel. Where I have placed figures in the columns indicate the amount due on next installment. By Curtis and Arnold paying $10.00 and returning their certificate we will issue them paid up stock, as they are dissatisfied. Your remittance of July 3d of 123.90 is not on this statement, as I do not know who to credit it to.

209 (The plaintiff next offers in evidence the certificate of stock, to which the defendant objects on the grounds of its being irrelevant, incompetent and immaterial; objection overruled by the court; to which the defendant excepts.)

The certificate of stock is in words and figures as follows, to wit:

THE GREAT WESTERN INSURANCE COMPANY.

Number 2432.] [Shares 10.

Organized July 20th, 1857, under act of legislature, approved March 4th, 1857. Capital stock $500,000, with liberty to increase to 5,000,000 dollars.

This is to certify that T. A. Kent is entitled to ten shares in the capital stock of the Great Western Insurance Company, of Chicago, Ill's, of one hundred dollars each, of which twenty per cent. is payable as follows; five per cent. on receipt of stock certificate; five per cent. in three months from date hereof; five per cent. in six months from date hereof; five per cent. in nine month' from date, transferable only on the books of the company, in person or by attorney, on the surrender of this certificate, being subject to the charter and by-laws of said corporation and laws of the State of Illinois. Dated at Chicago, this 22d day of January, in the year of our Lord one thousand eight hundred and seventy-two.

H. L. STEWART,
President.

C. D. HOOKER,
Secretary.

(On margin:) Non-assessable.

[25 cts. int. rev. stamp cancelled.]

The following is a copy of another certificate of stock offered in evidence by plaintiff, to which defendant objected on the grounds of its being incompetent, irrelevant & immaterial; objection overruled
210 by the court, to which defendant excepts.

THE GREAT WESTERN INSURANCE COMPANY.

Number 1878.] [Shares 10.

Organized July 20th, 1857, under act of legislature, approved March 4th, 1857. Capital stock $500,000, with liberty to increase to $5,000,000 *dollars.*

This is to certify that T. A. Kent is entitled to ten shares in the

capital stock of the Great Western Insurance Company, of Chicago, Ill's, of one hundred dollars each, of which twenty per cent. on receipt of stock certificate; five per cent. in three months from date hereof; five per cent. in six months from date hereof; five per cent. in nine months from date, transferable only on the books of the company, in person or by attorney, on the surrender of this certificate, being subject to the charter and by-laws of said corporation and laws of the State of Illinois.

Dated at Chicago, this sixth day of February, in the year of our Lord one thousand eight hundred and seventy-one.

H. L. STEWART, *President.*

C. D. HOOKER, *Secretary.*

(On margin:) Non-assessable.

[Rev. stamp.]

The following copy of bond was then offered in evidence by plaintiff, which was objected to by defendant, on the grounds of its being irrelevant, incompetent and immaterial; objection overruled by the court, to which defendant excepts.

THE GREAT WESTERN INSURANCE COMPANY.

No. 1878.] [$.

211 Organized July 20th, 1857, under act of legislature, approved March 4th, 1857. Capital stock $500,000, with liberty to increase to 5,000,000 dollars.

Know all men by these presents, that for and in consideration of 10 shares of the capital stock of the Great Western Insurance Company, of Chicago, Ill's, received by me, I am held and firmly bound and agree to pay the Great Western Ins. Co., of Chicago, the sum of two hundred dollars in installments, as follows; twenty-five per cent. thereof on receipt of stock certificate; twenty-five per cent. in three months from date hereof; twenty-five per cent. six months from date hereof; twenty-five per cent. nine months from date, with interest 10 per cent. after due, May 20th, 1871.

Signed and delivered in presence of—

T. A. KENT.

(On margin:) Stock non-assessable.

[Stamp.]

The plaintiff next offers in evidence the following letters from T. A. Kent, numbered from 1 to 12 inclusive.

(Objected to by defendant, on the grounds of its being immaterial, irrelevant and incompetent; objections overruled by the court, to which the defendant excepts.)

1.] [Gr. W. In's Co. stamp.]

OFFICE MAYOR BLOCK, COR. LA SALLE AND MADISON ST'S,
Cheyenne, W. T., June 24, '71.

C. D. HOOKER, Esq.,
Sec. Gr't Western Ins. Co., Chicago, Ill's:

DEAR SIR: Please find inclosed stock bond of M. C. Foot with draft,

less exchange for first payment, and daily report No. 7928, for removal of Church Howe personal property to Railroad House, which is
212 endorsed on his policy No. 7928.

Please acknowledge the same,

Yours, most respectfully,

T. A. KENT, *Agent.*

(Defendant objects to the introduction in evidence of the following letter, on the grounds that it is incompetent, irrelevant & immaterial; objection overruled, to which defendant excepts:)

2.] CHEYENNE, W. T., *July* 8, '71.

C. D. HOOKER, Esq.,
Sec. Great Western Ins., Chicago, Ill's.

D'R SIR: Please find inclosed daily report No. 7944, and draft for ($75.00) seventy-five dollars, less exchange for second payment on the stock of E. H. Heller, G. W. Williams & J. Valentine; please send me receipts for, as I have not got the numbers of their stock.

Yours, most respectfully,

T. A. KENT.

(Defendant objects to the introduction in evidence of the following letter, on the grounds that it is incompetent, irrelevant and immaterial; objected overruled, to which defendant excepts:)

3.] CHEYENNE, W. T., *July* 17, '71.

C. D. HOOKER,
Sec. Great Western Ins., Chicago, Ill's:

D'R SIR: Daily reports 7938 & 7939 went on June 2 & 6th, when Mr. Long was here, but will send duplicate, if they are not at
213 hand; I would have sent policies consecutively, but thought it best to use up some odd one on hand. H. H. Pierce has put in a claim of five hundred dollars more than the company has against him, and is prepared to swear it through. It is reported here on the street, that Pierce has said that the company is afraid to send Major Long here again, for he, H. H. Pierce, would have him indicted by the grand jury. This is only street talk, but of course it all has its effect; is used by other insurance agents, to good advantage. Judge Howe order' books, paper & supplies taken by the sheriff returned to him again yesterday; they found some flaw in the law. For the good name of the company, this man ought to be handled in a way that he would never forget.

Yours, most respectfully,

T. A. KENT.

P. S.—Do you intend to have bank make your collections for second & third payments on stock. I have not got a list of numbers of stock issued here, nor do not know when they fall due. G. F. Price wants his bond here when he makes his payments, so that he can see the indorsement. What will I do with the Curtis and Arnold stock? It would be to the advantage of the company to take it up and keep them from talking so much.

Yours, &c.,

T. A. K.

(Defendant objects to the introduction in evidence of the following letter on the grounds that it is incompetent, irrelevant, and immaterial. Objection overruled, to which defendant excepts:)

214

4.] CHEYENNE, W. T., *July* 19, '71.

C. D. HOOKER, Esq.,
Sec. Great Western Ins. Co., Chicago, Ill's:

DEAR SIR: Yours of the 14th inst. came to hand this morning, and am sorry to give you so much trouble. But suppose that the bond would show who to give the credit to, as it was indorsed on the back and signed by J. H. Frantz. It was his bond for the *for the* first payment on his second lot of stock. I replevied supplies of the Great Western from H. H. Pierce again to-day.

Yours, most respectfully,

T. A. KENT.

(Defendant objects to the introduction in evidence of the following letter on the grounds that it is incompetent, irrelevant, & immaterial. Objection overruled, to which defendant excepts:)

5.] CHEYENNE, W. T., *July* 3, '71.

C. D. HOOKER, Esq.,
Sec. Great Western Ins., Chicago, Ill's:

DEAR SIR: Please find enclosed abstract for June. J. H. Frantz's bond and draft for (123.90) one hundred and twenty-three dollars and ninety cents, which includes money for first payment on his stock. Please change his name on your books, as he has signed it. I
215 made change on stock. Hoping that *that* you will find abstract made out properly, and that I will be able to make a better showing next month,

I remain yours, most respectfully,

T. A. KENT.

Supplies arrived to-day.

(Defendant objects to the introduction in evidence of the following letter on the grounds that it is incompetent, irrelevant, & immaterial. Objection overruled, to which def't excepts:)

6.] CHEYENNE, W. T., *Aug.* 3, '71.

C. D. HOOKER, Esq.,
Sec. Great Western Ins. Co., Chicago, Ill's:

DEAR SIR: Please find enclosed statement for July, with draft for $63.00 to balance the same; also, find enclosed draft for $425.09, less the exchange for payments on the following stock:

1st	payment	on	J. W. Mason, 1932	$100
2d	"	"	Church Howes, 1929	25
2	"	"	J. A. Campbell, 1928	25
2	"	"	E. H. Heller, 1923	25
2	"	"	G. F. Price, 1922	50
2	"	"	W. B. Royal, 1920	100
2	"	"	W. R. Steele, 1930	50
2	"	"	Thos. Duncan, 1918	50

I will make the other collections as fast as they become due, and forward you the money. I have not been able to do anything with Curtis & Arnold; but think it would pay the company to take their stock up and pay them what they paid for it. Wooley & Hugus say they
216 will fix their stock up as soon as Major Long comes back. H. A. Pierce has shipped the books and papers out of the country that the judge order' me to return to him. I had them replevied again, and he had a lawyer take them out of the sheriff's office when he was not in. I do not know what the result will be. If Major Long gets here tomorrow Pierce's case with the company will be heard. If not, McLaughlin will try and have it held over till next term. No depositions have as yet arrived from the company. The future of this branch depends on how you handle this man, H. A. P.; for if he is not put through to the full extent of the law people will have the impression that the company were doing him an injustice, or, at least, that's what he, H. A. P., tells every one. He say Major Long will not return to this country again, and that the company owes him more money that their claim am'ts to. Hoping that he will find out his mistake before long,

I remain, yours most respectfully,

T. A. KENT.

(Addenda.)

GREAT WESTERN INS. CO. *vs.* H. A. PIERCE. } In dist. court. Replevin.

Great Western Ins. Co. to T. J. Carr, sheriff, Dr.

1871.			
June 21.	To service writ & mileage		2 75
	To making copy & certifying		1 25
217	To appraisement & swearin' app's		2 00
	" appraisers fees, 2 men		2 00
	" approving bond & return of writ		1 25
	" service summons on Pierce & ret		2 00
			11 25

T. J. CARR,
Sheriff, &c.

The above is correct.

D. McLAUGHLIN,
Attorney for Plaintiff.

(Def't objects to the introduction in evidence of the following letter, on the grounds that it is incompetent, irrelevant, and immaterial; objection overruled, to which defendant excepts:)

7.] CHEYENNE, W. T., *Sept.* 2, 1871.

C. D. HOOKER, Esq.,
Sec. Great Western Ins. Co., Chicago, Ill's:

DEAR SIR: Please find enclosed draft for $325.00, three hundred and twenty-five dollars less exchange for to pay second and third installment on the following stock:

T. A. Kent,	No. 1878,	third	payment	.....	50 00
G. D. Foglesong & Co.,	" 1881,	"	"	.....	50 00
Thomas Duncan,	" 1882,	"	"	.....	25 00
G. F. Price,	" 1889,	"	"	.....	50 00
Tim Dyer,	" 1892,	"	"	.....	50 00
E. W. Crittenden,	" 1130,	"	"	.....	50 00
James Valentine,	" 1912,	"	"	.....	25 00
218 G. D. Williamson,	No. 1913,	third	payment	.....	25 00
E. H. Heller,	" 1914,	"	"	.....	25 00
Jo. H. Frantzs,	" 2020,	second	"	.....	50 00
C. A. Reynolds,	" 2023,	"	"	.....	50 00
O. P. Stokes,	" 2024,	"	"	.....	25 00
O. P. Stokes,	" 2028,	"	"	.....	25 00

Also find enclosed receipt from Mr. McLaughlin, which I paid him $50 (fifty dollars) on, and I have also 225.00 (two hundred and twenty-five) dollars still in the bank, which will be forwarded as soon as the suit is settled here on the 20th. I forwarded in this a full statement of all those that have paid, which I suppose you want to credit, even though the suit is not decided for some time yet.

Yours, most respectfully,

T. A. KENT.

(Addenda.)

To draft, less exchange	323 00	
" exchange	2 00	
" D. McLaughlin	50 00	
" money attached	225 00	
		600 00
By cash for stock	600 00	

(Defendant objects to the introduction in evidence of the following letter, on the grounds that it is incompetent, irrelevant, and immaterial; objection overruled, to which defendant excepts:)

8.] CHEYENNE, W. T., *Sept.* 18, '71.

C. D. HOOKER, Esq.,

219 *Sec. Great Western Ins. Co., Chicago, Ill's:*

DEAR SIR: Please find enclosed draft for $100.00 (one hundred dollars) less exchange for 3d payment on Joslin and Park's stock No. 1890, $50.00; 4th payment on James Valentine No. 1912, $25.00; 4th payment on E. H. Heller's No. 1914, $25.00. Please send me James Valentine's bond, 1912, and E. H. Heller's bond, 1914, as soon as possible, receipted in full. T. Dyer, 3705, and Joslin and Park's, 3702, has been reinsured.

Yours, most respectfully,

T. A. KENT.

(Defendant objects to the introduction in evidence of the following letter on the grounds that it is incompetent, irrelevant, & immaterial; objection overruled, to which defendant excepts:)

CHEYENNE, W. T., *Sept.* 23, '71.

C. D. HOOKER, Esq.,

Sec. Great Western Ins. Co., Chicago, Ill's:

DEAR SIR: Please forward to me as soon as possible L. L. Tesson's

bond, No. 1910, so that I will get it by the first of the month; he wishes to pay it up before leaving here for a visit.

Yours, most respectfully,

T. A. KENT.

(Defendant objects to the introduction in evidence of the following letter, on the grounds of its being incompetent, irrelevant, and immaterial; objection overruled, which defendant excepts:)

220 9.] CHEYENNE, W. T., *Oct.* 2, '71.

C. D. HOOKER, Esq.,
Sec. Great Western Ins. Co., Chicago, Ill's:

DEAR SIR: Please find enclosed statement for the month of Sept., with draft for 333.60 (three hundred and thirty-three and sixty cents) to balance in full a/c. Please credit to L. S. Tesson, No. 1910, 3d & 4th payments on stock, $100; 3d payment on Stimpson & Bernard, No. 1909, $50.00; 2nd payment on M. C. Foats, No. 1174, $50.00; 2nd payment on J. C. Frantz' second lot of stock, June 29th, 25.00. I have not got his number. If you write Major Long he will advise you as per second payment on L. S. Tesson's stock. I talked with him about it when here. It was paid when he was here before. In yours of the 23d you state that I made complaint about not receiving supplies when ordered. When Major Long was here he asked me if I had received the agency sign, a new register, and some other things that he had ordered when here before; I told him I had not; any more than this I do not think was said. There is not any one here who can letter a sign. Hoping that you will find everything all O. K.,

I remain, yours, most respectfully,

T. A. KENT.

10.]

(Defendant objects to the introduction in evidence of the following letter, on the grounds that it is incompetent, irrelevant, and immaterial; objection overruled, to which defendant excepts:)

221 11.] CHEYENNE, W. T., *Oct.* 7, '71.

C. D. HOOKER, Esq.,
Sec. Great Western Ins. Co., Chicago, Ill's.

DEAR SIR: Please find enclosed draft for $400. Four hundred dollars less the exchange for 3rd payment on Geo. T. Price's, No. 1922. 50.00, 2nd & 3rd payments on W. B. Hugus, No. 1901, $250. 2nd & 3rd payments on C. H. Warren's, No. 1883, $100.00. Please acknowledge receipt, and oblige,

Yours, most respectfully,

T. A. KENT.

(Defendant objects to the introduction in evidence of the following letter, on the grounds that it is incompetent, irrelevant, and immaterial; objection overruled, to which defendant excepts:)

CHEYENNE, W. T., *Oct.* 26, '71.

C. D. HOOKER, Esq.,
Sec. Great Western Ins. Co., Chicago, Ill's.

DEAR SIR: Please find enclosed policies No. 7951 and 7952, which were ordered, but not taken for want of funds. At a meeting of the

directors of the Cheyenne branch of the Great Western Insurance Company, held here on the 25th, I was instructed to request your board to appoint a general agent for the Territories of Wyoming, Colorado, and Utah. They are of the opinion that the interests of the company requires a man out here who thoroughly understand' his business.
222 It is only a matter of time for the Great Western to be leading insurance company of the West. Hoping that you will give this matter your consideration,

I remain, yours, most respectfully,

T. A. KENT.

(Defendant objects to the introduction in evidence of the following letter, on the grounds that it is incompetent, irrelevant, & immaterial; objection overruled, to which defendant excepts:)

CHEYENNE, W. T., *Nov.* 4, '71.

C. D. HOOKER, Esq.,
Sec. G. W. Ins. Co., Chicago, Ill's.

DEAR SIR: Please find enclosed statement for October, and draft for $369.50, to balance the same to date. Find enclosed pol's Nos. 11632 and 11631. Hurlbut's returned because rates were raised. Murrin's because the cash was not forthcoming. Give W. B. Royal credit for $100 on his, No. 1920. Money held in my hand for garnishee, is returned in this statement. I have not been able to make a single collection since you have assessed the stock. Major Long will likely be able to fix things here.

Yours, most respectfully,

T. A. KENT.

(Defendant objects to the introduction in evidence of the following letter, on the grounds that it is incompetent, irrelevant, & immaterial; objection overruled, to which defendant excepts:)

223 CHEYENNE, W. T., *Dec.* 5, '71.

C. D. HOOKER, Esq.,
Sec. G. W. Ins. Co., Chicago, Ill's.

DEAR SIR: Please find enclosed statement for business done here for month of Nov. Also bills which Major Long authorized me to pay, and notes for settlement of L. S. Tesson's assessment of 20 per cent. on stock, No. 1910, also policy, which has not been taken for want of funds, No. 3748.

Yours, most respectfully,

T. A. KENT.

(Defendant objects to the introduction in evidence of the following letter, on the grounds that it is incompetent, irrelevant, and immaterial; objection overruled, to which defendant excepts:)

CHEYENNE, W. T., *Dec.* 8, '71.

C. D. HOOKER, Esq.,
Sec. G. W. Ins. Co., Chicago, Ill's.

DEAR SIR: Please find enclosed draft for $350, less exchange, to pay 4th installment on stock bond No. 1890, and assessment of 20% on stock No. 1890, $200, and 1914, $100.00. Please forward the bond for

No. 1890, and the receipts for the additional 20% on 1890, and No. 1914, and oblige,

Yours, most respectfully,

T. A. KENT.

224 (Defendant objects to the introduction in evidence of the following letter, on the grounds that it is incompetent, irrelevant, & immaterial; objection overruled, to which defendant excepts:)

CHEYENNE, W. T., *Dec.* 20, 1871.

C. D. HOOKER, Esq.,
Sec. G. W. Ins. Co., Chicago, Ill's.

DEAR SIR: I called a meeting of the stockholders of the Great W. Ins. Co. at this branch, and as the president and myself were the only ones present did not do anything, so I suppose the old board will hold over for next year. I think that after the 1st Jan'y that they will nearly all pay up their assessments. As yet I have not been able to collect any more than reported. Why don't you send my bond, and Joslin and Park's. I have asked for them once before. Please see that they are forwarded, and oblige,

Yours, most respectfully,

T. A. KENT.

(Defendant objects to the introduction in evidence of the following letter, on the grounds that it is incompetent, irrelevant, & immaterial; objection overruled, to which defendant excepts:)

CHEYENNE, W. T., *Dec.* 26, 1871.

C. D. HOOKER, Esq.,
Sec. G. W. Ins. Co., Chicago, Ill's.

DEAR SIR: Please find enclosed draft for $250, less exchange,
225 to pay 4th payment on stock No. 1909, and assessment of 20% on the same. Please forward me the same as soon as possible. As yet I have not been able to do any business this month. Hoping that other branches are responding to the call better than the Cheyenne branch, I remain,

Yours, most respectfully,

T. A. KENT.

(Defendant objects to the introduction in evidence of the following letter, on the grounds that it is incompetent, irrelevant, and immaterial; objection overruled, to which the defendant excepts:)

12] LAW OFFICE OF D. MCLAUGHLIN,
Cheyenne, W. T., Ap'l 6, '71.

GREAT WESTERN INSURANCE CO.,
Chicago, Ill's.

We have delayed informing you of the desire of the directors of this branch in relation to Mr. Holden, awaiting his arrival first, as he has not made his appearance and we can learn nothing of him; we deem it due to the stockholders of this branch as well as ourselves to lay before you the following facts:

First. H. A. Pierce lacks the confidence of the business community at this place, and some of the best men here will neither take stock in the

branch or insure in the company while he is permitted directly or indirectly to have any to do with the company.

226 Secondly. Pierce and Holden are advertised as partners (see the accompanying notice cut from Pierce' paper, Wyoming Daily News, and this fact has prejudiced the people here against Mr. Holden. Holden cannot act as agent of the company and be associated with Pierce in a partnership and have the confidence of the community.

Thirdly. Pierce claims (so we are informed) that he obtained the subscription to the stock of the branch at this point. If he has represented so to you the representations are without any foundation in truth. No one has taken one dollar's worth of stock from him. To Col. Long the credit is due, and that gentleman can inform you what the general opinion of this community is as to Pierce's honesty and veracity.

Fourthly. It is the desire of the directors and stockholders of this branch that Mr. T. A. Kent be appointed the agent at this place as he has the confidence of the people here. He is a business man of standing and ability and will give character to the company business here.

Lastly. Attention is called to the inclosed local squib cut this morning from Pierce' paper. A meeting of the directors was called at the office of D. McLaughlin on yesterday to confer with Mr. Holden (expecting he would arrive) and to lay before him the desire of the board of directors. He did not come and Pierce takes occasion to make it the subject of comment.

227 Respectfully, yours,

DANIEL McLAUGHLIN, *President.*
T. A. KENT.
GEO. D. FOGLESONG.
J. D. WOOLEY.

The plaintiff next offers in evidence a letter from C. W. Upton, the assignee, addressed to agents of the G. W. Ins. Co., requesting the return of records, &c., belonging to the co.

(Defendant objects on the grounds of its being immaterial, irrelevant, and incompetent; objection overruled by the court, to which the defendant excepts:)

The following is a copy of the letter reported:

CENTRAL OFFICE, G. W. INS. CO.,
Corner Canal and Madison streets, Chicago, April 23, 1872.

T. A. KENT, Esq.,
Cheyenne, W. T.

DEAR SIR: The enclosed circular will apprise you of the appointment of the undersigned as assignee of the Great Western Insurance Co. of this city in bankruptcy. By order of the court it is directed that agents forward at once to this office by express all books, records, or papers in their possession pertaining to the business of the company, a statement of its condition is being made out and will be presented at an early day.

Very truly, yours,

C. W. UPTON,
Assignee.

228 (The plaintiff next offered in evidence eight receipts for money paid, which were objected to by defendant as being irrelevant, incompetent, and immaterial; objection overruled by the court, to which defendant excepts:)

Here follows copies of the 8 receipts referred to:

THE GREAT WESTERN INSURANCE COMPANY OF CHICAGO,
Cheyenne, W. T., May, 1871.

Received of Joslin and Park's the sum of fifty dollars, amount due on second installment on stock certificate No. 1890.

THOS. W. J. LONG,
Special Ag't for G. W. Ins. Co.

THE GREAT WESTERN INSURANCE CO. OF CHICAGO,
Cheyenne, W. T., May, 1871.

Received of T. A. Kent the sum of fifty dollars, amount due on second installment on stock certificate No. 1878.

THOS. W. J. LONG,
Sp'l Ag't for G. W. Ins. Co.

GREAT WESTERN INSURANCE CO. OF CHICAGO,
Chicago, Ill's Sept. 13, '71.

Received of Joslin and Park the sum of fifty dollars, amount due on 3d installment on stock certificate No. 1890.

C. D. HOOKER, *Sec. In.*

Received, Chicago, Dec. 15, 1871, of Joslin and Park, the sum of $200, being the amount of assessment due above on stock certificate No. 1890 of this company.

C. D. HOOKER, *Sec. In.*

The foregoing am't was paid in compliance with the following:

G. W. I. Co., *Chicago, Oct.* 19, '71.

229 Resolved that an assessment of 20 % be, and is hereby, made upon the capital stock of the company, payable at the central office of the company on or before the 15th day of Nov., 1871.
By order of the finance committee.

GREAT WESTERN INSURANCE CO. OF CHICAGO,
Cheyenne, W. T., Nov. 28, '71.

Received of T. A. Kent, esq., the sum of fifty dollars, amount due on third installment on stock certificate No. 1878.
This amount was paid some time since.

THOS. W. J. LONG,
Gen'l Ag't Mountain Dep't.

GREAT WESTERN INSURANCE COMPANY OF CHICAGO,
Cheyenne, Nov. 28, 1871.

Received of T. A. Kent the sum of fifty dollars amount due on 4th installment on stock certificate No. 1878.

THOS. W. J. LONG,
Gen. Ag't. Mountain Dep't.

GREAT WESTERN INSURANCE COMPANY OF CHICAGO,
Cheyenne Branch, Nov. 28, '71.

Received of T. A. Kent, two hundred dollars, amount on one assessment of twenty per cent. on st'k certificate No. 1878, made by finance committee of said company on the 19th day of October, 1871, payable on or before the 15th day of November, A. D. 1871.

THOS. W. J. LONG,
Gen. Ag't Mountain Dep't.

230 GREAT WESTERN INSURANCE OFFICE,
Chicago, Dec. 15, '71.

Received of Mess. Joslin and Park's the sum of $50.00, being the full amount due on 4th installment of stock certificate No. 1890 of this company.

C. D. HOOKER, *Sec. In.*

The plaintiff next offers in evidence a copy of a printed pamphlet containing the by-laws & names of officers and stockholders of the Great W. Ins. Co.

(The defendant objects on the grounds of its being immaterial, irrelevant, and incompetent; objection overruled by the court to which the defendant excepts.)

Here follows a copy of the title page of said pamphlet, also a copy of the by-laws contained therein:

Title page.

GREAT WESTERN INSURANCE COMPANY, CHICAGO.

Capital stock	$5,000,000 00
Subscribed capital	1,188,000 00
Cash capital	222,831 00

By-laws.

Whereas, by an act of the general assembly of the State of Illinois, approved Feb. 4th, A. D. 1857, The Great Western Insurance Company was chartered and authorized to make and establish and put into execution such by-laws, ordinances, and resolutions as might seem necessary or convenient for the regulation, government, and management of its affairs, the same not being at variance with the laws of this State or the United States.

231 Therefore be it resolved, That we hereby repeal all by-laws heretofore adopted and proceed to organize the Great Western Insurance Company under the corporation system, the home office being located in Chicago, and we adopt the following by-laws and regulations for the government of said company:

SEC. 1. The central office of the Great Western Insurance Company shall be permanently located in the city of Chicago, State of Illinois.

SEC. 2. The annual meetings of the stockholders for the election of directors and other business shall be held at the respective localities where stockholders reside on the third Wednesday of December of each year. No action of such meeting shall be legal or binding which does not receive the sanction of a majority of all the stock held in the particular locality. The stockholders may at any annual meeting determine the number of directors to be elected, said number not exceeding one for every ten thousand of stock.

SEC. 3. The stockholder' in each locality may elect one director for every ten thousand dollars of stock held in the place. Directors thus elected shall continue in office one year or until their successors are chosens. No person shall be a director who is not a stockholder and the transfer of all the stock of a director shall vacate his office.

232 SEC. 4. The directors shall hold regular annual meetings for the election of officers and other business in Chicago on the third Wednesday of January of each year. Each director shall be entitled

to one vote for every ten thousand dollars of stock represented by him, and a majority of votes thus represented shall constitute a quorum for the election of officers and the transaction of all necessary business.

SEC. 4. The officers of the company shall consist of a president, vice-president, secretary, treasurer, and an executive committee consisting of the president and one member for each one hundred thousand dollars of the stock held in the different States, and the directors from each State may nominate from their own number such committeemen. The aforesaid officers shall hold their respective offices for one year or until their successors are elected.

SEC. 6. The directors may remove any officer of the company at any regular meeting or any special meeting called for that purpose, provided no officer shall be removed except for cause, and on specific charges, and no officer shall be removed by less than a majority vote of the directors present.

SEC. 7. The compensation of the officers shall be fixed from year to year by resolution of the directors.

233 SEC. 8. It may be lawful for the president, with the advice and consent of the executive committee, to appoint assistant secretaries whose duties shall be specified.

SEC. 9. At the election of directors, each stockholder shall be entitled to one vote for each share of stock standing in his name, or he may vote by proxy. All proxies shall be in the following form: "Proxy vote. I hereby appoint as my proxy to cast my vote upon all questions which may become before any meeting of the stockholders of the Great Western Insurance Company, until further notice."

SEC. 10. The general duties of the president shall be those usual to the office of president. He shall preside at all meetings of the board, sign all stock certificates, policies of insurance, and legal contracts entered into by the company, and may give a casting vote upon all questions or resolutions before the board. He shall sign all checks or draft' upon the treasurer for payment of all debts or claims against the company, or for any other purpose, when properly audited. In the absence of the president, the duties of his office shall devolve on and be performed by the vice-president.

SEC. 11. It shall be the duty of the secretary to keep all the books of the company in a systematic and correct manner, and at all
234 times open for inspection of the stockholders, and keep all documents and papers properly filed and secured. In addition to which the special duties of the secretary shall be to manage the fire-insurance business of the branches and agencies of the company. He shall prepare and countersign all stock certificates, policies of insurance, records and contracts, executed or entered into by this company. He shall receive all monies belonging to this company, and pay the same over to the treasurer daily, taking his receipt therefor. He shall countersign all drafts and checks upon the treasurer for the payment of audited claims; he shall conduct the correspondence of the company; shall examine and decide upon applications of insurance, and in the adjustment of losses; he shall have a general supervision of the agents of the company with full power to employ and discharge the same, and shall make a quarterly report to the executive committee and an annual report of his doings to the board. The duties of the secretary to be under the supervision of the executive committee.

SEC. 12. It shall be the duty of treasurer to keep an accurate account of all moneys coming into his hands, and pay the same on the draft or check of the president, countersigned by the secretary, mak-

ing a quarterly report to the directors. The treasurer shall give bonds to the company for the faithful performance of his duty, in such amount as may from time to time be required by the directors. The
235 treasurer shall loan no funds of the company without the sanction of the executive committee.

SEC. 13. The duties of the executive committee during their interim between the annual meetings of directors, not otherwise provided for by the by-laws, shall consist in auditing accounts and claim, and they shall have general supervision and management of the affairs of the company chosen from and representing the full board of directors. The members of said committee shall be nominated and elected in the following manner: Every State representing $100,000 or more of stock shall be entitled to one member. The names of the persons then nominated shall be submitted to the directors in annnal meeting and duly elected as members of the executive committee for the ensuing year. The executive committee shall act in place of the full board of directors, except that they shall not change or take any action in conflict with, or not authorized by, the by-laws. It shall be the special duty of the executive committee to examine into the affairs of the company, receive the reports of officers, verify their statements, record their approval or disapproval of the same. A majority of the members present shall constitute a quorum for the transaction of business. In the event of death, resignation, or removal of an officer of the company the executive committee may appoint a successor pro tem.

SEC. 14. From the profits of the business or income cash divi-
236 dends may be declared and paid upon the paid-up cash capital, not to exceed, however, (5) per cent., semi-annually in January and July. The remainder of the profits to be applied pro rata on payment of stock carried to surplus funds.

SEC. 15. All persons sustaining loss or damage by fire on property insured in this company shall forthwith give notice thereof to the secretary, or some duly authorized agent of the company, and within thirty days after the said loss or damage deliver a particular account of the same, verified by oath or affirmation, and the same general rule shall apply in case of loss from other causes.

SEC. 16. All claims for loss or losses against this company shall be due and payable at the office of the company or the agency from which such policy of insurance issued, within sixty days from date of approval of such claim.

SEC. 17. This company reserves the right to cancel the stocks of any stockholder for the non-payment of any installment due said company by refunding to said stockholder the amount paid on said stock, or reducing the amount of stock and issueing to him fully paid-up stock for the amount actually and originally paid thereon at the rate of one hundred cents on a dollar. This company shall have a lien upon the
237 stock of each member to secure the payment of any note or installment or proportion thereof as may be required for the space of thirty days, after notice of the same shall have been made by the secretary. The board of directors or executive committee may realize upon such stock as they may deem the interest of the company requires, and the proceeds received therefor shall be applied in payment of such note or installment.

SEC. 18. The stock of this company shall be transf'rrable, either in person or by power of attorney, by signing the transfer forms provided in the office of the company, at Chicago, Ills., provided all installments due thereon shall have been paid.

to one vote for every ten thousand dollars of stock represented by him, and a majority of votes thus represented shall constitute a quorum for the election of officers and the transaction of all necessary business.

SEC. 4. The officers of the company shall consist of a president, vice-president, secretary, treasurer, and an executive committee consisting of the president and one member for each one hundred thousand dollars of the stock held in the different States, and the directors from each State may nominate from their own number such committeemen. The aforesaid officers shall hold their respective offices for one year or until their successors are elected.

SEC. 6. The directors may remove any officer of the company at any regular meeting or any special meeting called for that purpose, provided no officer shall be removed except for cause, and on specific charges, and no officer shall be removed by less than a majority vote of the directors present.

SEC. 7. The compensation of the officers shall be fixed from year to year by resolution of the directors.

233 SEC. 8. It may be lawful for the president, with the advice and consent of the executive committee, to appoint assistant secretaries whose duties shall be specified.

SEC. 9. At the election of directors, each stockholder shall be entitled to one vote for each share of stock standing in his name, or he may vote by proxy. All proxies shall be in the following form: "Proxy vote. I hereby appoint as my proxy to cast my vote upon all questions which may become before any meeting of the stockholders of the Great Western Insurance Company, until further notice."

SEC. 10. The general duties of the president shall be those usual to the office of president. He shall preside at all meetings of the board, sign all stock certificates, policies of insurance, and legal contracts entered into by the company, and may give a casting vote upon all questions or resolutions before the board. He shall sign all checks or draft' upon the treasurer for payment of all debts or claims against the company, or for any other purpose, when properly audited. In the absence of the president, the duties of his office shall devolve on and be performed by the vice-president.

SEC. 11. It shall be the duty of the secretary to keep all the books of the company in a systematic and correct manner, and at all
234 times open for inspection of the stockholders, and keep all documents and papers properly filed and secured. In addition to which the special duties of the secretary shall be to manage the fire-insurance business of the branches and agencies of the company. He shall prepare and countersign all stock certificates, policies of insurance, records and contracts, executed or entered into by this company. He shall receive all monies belonging to this company, and pay the same over to the treasurer daily, taking his receipt therefor. He shall countersign all drafts and checks upon the treasurer for the payment of audited claims; he shall conduct the correspondence of the company; shall examine and decide upon applications of insurance, and in the adjustment of losses; he shall have a general supervision of the agents of the company with full power to employ and discharge the same, and shall make a quarterly report to the executive committee and an annual report of his doings to the board. The duties of the secretary to be under the supervision of the executive committee.

SEC. 12. It shall be the duty of treasurer to keep an accurate account of all moneys coming into his hands, and pay the same on the draft or check of the president, countersigned by the secretary, mak-

ing a quarterly report to the directors. The treasurer shall give bonds to the company for the faithful performance of his duty, in such amount as may from time to time be required by the directors. The
235 treasurer shall loan no funds of the company without the sanction of the executive committee.

SEC. 13. The duties of the executive committee during their interim between the annual meetings of directors, not otherwise provided for by the by-laws, shall consist in auditing accounts and claim, and they shall have general supervision and management of the affairs of the company chosen from and representing the full board of directors. The members of said committee shall be nominated and elected in the following manner: Every State representing $100,000 or more of stock shall be entitled to one member. The names of the persons then nominated shall be submitted to the directors in annual meeting and duly elected as members of the executive committee for the ensuing year. The executive committee shall act in place of the full board of directors, except that they shall not change or take any action in conflict with, or not authorized by, the by-laws. It shall be the special duty of the executive committee to examine into the affairs of the company, receive the reports of officers, verify their statements, record their approval or disapproval of the same. A majority of the members present shall constitute a quorum for the transaction of business. In the event of death, resignation, or removal of an officer of the company the executive committee may appoint a successor pro tem.

SEC. 14. From the profits of the business or income cash divi-
236 dends may be declared and paid upon the paid-up cash capital, not to exceed, however, (5) per cent., semi-annually in January and July. The remainder of the profits to be applied pro rata on payment of stock carried to surplus funds.

SEC. 15. All persons sustaining loss or damage by fire on property insured in this company shall forthwith give notice thereof to the secretary, or some duly authorized agent of the company, and within thirty days after the said loss or damage deliver a particular account of the same, verified by oath or affirmation, and the same general rule shall apply in case of loss from other causes.

SEC. 16. All claims for loss or losses against this company shall be due and payable at the office of the company or the agency from which such policy of insurance issued, within sixty days from date of approval of such claim.

SEC. 17. This company reserves the right to cancel the stocks of any stockholder for the non-payment of any installment due said company by refunding to said stockholder the amount paid on said stock, or reducing the amount of stock and issueing to him fully paid-up stock for the amount actually and originally paid thereon at the rate of one hundred cents on a dollar. This company shall have a lien upon the
237 stock of each member to secure the payment of any note or installment or proportion thereof as may be required for the space of thirty days, after notice of the same shall have been made by the secretary. The board of directors or executive committee may realize upon such stock as they may deem the interest of the company requires, and the proceeds received therefor shall be applied in payment of such note or installment.

SEC. 18. The stock of this company shall be transf'rrable, either in person or by power of attorney, by signing the transfer forms provided in the office of the company, at Chicago, Ills., provided all installments due thereon shall have been paid.

SEC. 19. Holders of stock claiming a loss of their certificate shall advertise the same in a daily paper of this city for two consecutive days; otherwise no duplicate certificate shall be issued, and the directors or executive committee may require a bond of indemnity in such cases.

SEC. 20. The books for the transfer of stock in this company shall be closed two days previous to each annual election.

SEC. 21. Every person who shall subscribe for $10,000 stock and pay twenty per cent. thereof shall be considered a director of this company, and shall continue such director so long as he shall retain such stock an amount equal to $10,000.

238 SEC. 22. The by-laws may be added to, altered, or amended at any annual meeting of the corporation or any special meeting called for that purpose by a majority vote of the stockholders present or their authorized proxies.

SEC. 23. At the annual meetings the following shall be the order of business:

1. Calling roll. 2. Reading reports of officers and disposition of same. 3. Reports of standing committees. 4. Reports of special committees. 5. Unfinished business. 6. Election of officers. 7. New business.

BRANCH OFFICES.

SEC. 24. In every city or town where ten thousand dollars or more of stock shall be subscribed and twenty per cent. paid thereon there shall be established a branch office, and the stockholders thereat may meet at once and elect one of their number as president of such branch, and elect one director of such branch for every ten thousand dollars of stock taken and paid for as aforesaid; and such directors shall be ex-officio directors of the company. The president and directors so chosen shall their office until the first annual meeting, on the third Wednesday of the ensuing December, or until their successors are chosen. The annual meeting of the stockholders of each branch for election of the president and directors of the branch shall be held on the third Wednesday of each year.

A record of all such meetings shall be preserved and a copy of the same forwarded immediately to the home office. The president
239 of such branch shall preside at all meetings thereof, but in the absence of the president the stockholders in regular meeting may designate one of their own number to preside.

The directors shall have power to delegate their authority and right to vote and act at their annual meeting in Chicago; and the person who shall be authorized to vote act at such meeting shall be furnished with a written proxy, which proxy shall be endorsed by the manager of the branch which such person shall represent.

At all meetings of directors the directors present from any branch shall entitled to cast as many votes as shall be equal to the number of directors such branch shall be entitled to.

The traveling and other necessary expense' of one director or his legal representative shall be paid by the managers of the branches and charged in account to the company.

(The plaintiff next offers in evidence the forms of policies of the G. W. Ins. Co., which are objected to by the defendant as being immaterial, irrelevant, & incompetent. Objection overruled by the court,

to which the defendant excepts.) Here follows the 2 blank forms referred to.

240 THE GREAT WESTERN INSURANCE COMPANY.

Central office, Chicago, Illinois.

No. 11642.] *Stock policy.*

In consideration of dollars, do insure and legal representative for year from the day of , 18 , at noon, to the day of , 18 , at noon, against loss by fire and to the amount of dollars.

Amount, $; time, ; rate, ; premium, $.

And said company hereby agree to make good unto the said assured, or the executors, administrators, and assigns of the assured all such immediate loss or damage, not exceeding the sum insured, as may occur by fire to the property specified except as hereinafter provided, to be paid sixty days after receipt of due notice and satisfactory proofs of the same; it being covenanted as conditions of this contract that the company may repair, restore, or replace the property lost or damaged on giving notice of such intention within thirty days after receipt of proofs herein required; and that this company shall not be liable for loss by theft at or after a fire, nor for loss caused by invasion, insurrection, riot, civil commotion, military or usurped power; nor for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only; nor for loss or damage caused by removal of property from a building, where there is no loss by fire, unless such removal was necessary to preserve the property, in which case the damage shall be borne by both parties in proportion as the whole sum insured bears to the whole value of the property insured; nor for loss or damage caused by neglect to use all practicable means to save and preserve the property from damage at and after the fire, nor for loss or damage to the property of any other party, unless the interest of such party is stated in this policy; and there can be no abandonment to the company of the property insured. The assured shall not recover or demand of this company any greater portion of the loss or damage than the amount hereby insured shall bear to the whole sum insured on said property. The company may at any time cancel this policy, returning the unexpired premium pro rata, and the assured may cancel by paying the customary short rates for the expired term.

If at the happening of any fire the assured shall have insurance under a floating policy or policies, not specific but covering goods generally, in various places not designated, and yet within limits which include the premises or property herein insured, such policy as between the assured and this company shall be considered as covering any excess of sound value of the subject insured beyond the amount covered by the specific insurance thereon; and to determine the amount for which this company is liable in case of loss, such floating policy shall be considered as insurance on the property to the extent of such excess. In no event shall this company be liable for, nor shall there be payable under this policy, any greater sum than shall be equal to the interest of the assured in the property insured at the time of its loss or damage by fire or lightning.

If, without written permission endorsed hereon, the premises insured, or containing the property insured, are used or occupied for purposes

extra hazardous or specially hazardous, or the risk is increased by any means within the control of the assured, then, and in every such case, the policy shall be void.

If the assured, in the written or verbal application for insurance, makes any false or erroneous representations material to the risk, or if there is any neglect or deviation from the laws or police regulations made to prevent accidents from fire; or if the premises insured are occupied when insured and the premises shall afterward become vacant and unoccupied; or if there is any attempt on the part of the assured to defraud the company; or if the occupancy of the property is transferred or changed; or if, without written consent hereon, there is any prior or subsequent insurances, or the policy is assigned, then, and in every such case, this policy shall be void. This policy shall not be assigned, nor will the company be liable to any assignee thereof, unless the written consent of the company to such an assignment shall have been placed thereon.

Permission is given to use for lights gas, kerosene, coal-oil, or burning fluid.

All persons having a claim under this policy shall proceed at once to put the property saved in the best order possible, separating the damaged from the undamaged, assorting and arranging the various articles according to their kinds, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity and cost of each, and shall give immediate notice and render a particular account thereof in writing, under oath, stating the time, origin, and circumstances of the fire; the occupancy of the building insured or containing the property insured; the whole value and ownership of the property insured; the amount of the loss or damage upon each article; other insurances, if any, and a copy of all policies; shall also produce a certificate under the hand and seal of a magistrate or notary public, not interested in the loss or related to the assured, stating that he has examined the circumstances attending the fire loss or damage alleged; that he is acquainted with the character and circumstances of the claimant, and that he verily believes that such claimant has by misfortune, and without fraud or evil practice, sustained loss and damage to the subject insured, to the amount of which such magistrate or notary shall certify; if required, shall produce books of account and other proper vouchers, and be examined under oath touching all questions relating to the claim, and shall subscribe to the same; and until such proofs are rendered the loss shall not become payable. In no case shall the claim be for a greater sum than the actual damage or cash value at the time of the fire. Assignors, unless the assignee owns the property, must prove claims to be valid, or both, if required by the company. If differences of opinion should arise between the parties hereto as to the amount of loss or damage upon property partially damaged, the subject shall be referred to two disinterested and competent men, each party to select one (and in case of disagreement, they to select a third), who shall, under oath, ascertain, estimate, and appraise such partial loss or damage upon each article separately; and their award in writing shall be binding upon the parties hereto, each party paying one-half the expense of reference. And it is hereby agreed that the said insurance company may take any damaged property by paying the sound value of the same.

Reinsurance to be on the basis that in no event will this company be liable for a sum greater than such portion hereby reinsured bears to the whole sum insured by the company reinsured, and in case of loss

this company to pay pro rata, at and in the same time and manner as the company reinsured.

N. B.—Books of account, securities for money, evidences of debt, notes, bullion, bills, watches, furniture, plate, money, jewels, jewelry, precious stones, medals, paintings, engravings, patterns, models, casts, sculptures, statuary, fresco paintings, curiosities, musical and scientific instruments (piano fortes, melodeons or organs in dwellings, plate glass in doors and windows, when plates are the dimensions of three square feet or more, excepted), are not insured unless particularly mentioned in the policy.

It is agreed that the person or persons, if any other than the assured, who procures this insurance, to be taken by this company, shall be deemed the agent or agents of the assured, and not of this company, unless he be a regularly authorized agent of this company, in any transaction relating to this insurance. And it is further agreed that the premium for this insurance shall be paid to this company within thirty days, or this policy shall be void and of no effect.

In witness whereof The Great Western Insurance Company of Chicago have caused these presents to be signed by their president and attested by their secretary, in the city of Chicago, but the same shall not be binding unless countersigned by the duly authorized agent of said company at .

H. L. STEWART,
President.

C. D. HOOKER, *Secretary.*

Countersigned at day of , 187 .

Agent.

241 (On back:)

This policy is not assignable for purposes of collateral security, but in all such cases is to be made "payable in cases of loss, etc.," etc., by endorsement on face. In case of actual sale or transfer of title, leave having been previously obtained, the form subjoined may be used, which must be executed at the time of transfer.

The Great Western Insurance Company hereby consent that the interest of in the within policy, subject to all the terms and conditions therein mentioned and referred to, be assigned to , 187 .

For value received, hereby transfer, assign, and set over unto , and assigns, all title and interest in this policy, and all advantage to be derived therefrom.

Witness hand and seal this day of , 187 .

Sealed and delivered in presence of—

CHICAGO DIRECTORS.

Dr. C. V. Dyer.	H. H. Peck.	H. L. Stewart.
Washington Libby.	C. D. Hooker.	S. A. Briggs.
A. C. Stewart.	C. B. Smith.	J. Seeley Wallace.
Col. A. N. Waterman.	R. J. Waters.	Col. L. P. Sanger.
J. M. W. Jones.	J. T. Foster.	James Montgomery.
J. McK. Sanger.	Benj. Carver.	J. D. Woodward.
Horatio Hitchcock.	A. B. Pullman.	Geo. A. Archibald.
Phillip Wadsworth.	Chas. J. Stokes.	M. Smith.
W. N. Sturges.	L. S. Major.	E. Eugene Cadwell.
H. H. Newell.		H. B. Bryant.

EXECUTIVE COMMITTEE.

H. L. Stewart. J. M. W. Jones. L. S. Major.
R. J. Waters. A. N. Waterman. M. Smith.
H. H. Peck.

GEN. H. L. STEWART,
President.
C. D. HOOKER, *Secretary*

(Indorsed:) No. . Great Western. [Cut.] Cor. La Salle and Madison sts. Capital stock, $5,000,000.00; subscribed capital, $1,000,000.00; cash capital, $200,000.00. Amount insured, $; premium, $; policy, $. Premises, . Expires , A. D. 187 .

242 GREAT WESTERN INSURANCE COMPANY.

No. 9399.] Central office, Chicago. [$

By this policy of insurance, in consideration of dollars, to them paid by the assured hereinafter named, do insure against loss or damage by fire and lightning to the amount of dollars,

As follows, to wit:	Amount insured.	As follows, to wit:	Amount insured.	As follows, to wit:	Amount insured.
On story dwelling house	$	On sewing or knitting machines	$	On barn No. 2	$
On household furniture therein		On		On hay therein	
On wearing apparel therein		On farm barn and shed adjoining		On grain therein	
On family stores and grain therein		On hay therein		On farming utensils therein	
On silver and plated ware therein		On grain therein		On granary	
On printed books and engravings therein		On farming utensils therein		On grain therein	
On piano forte therein		On		On farming utensils therein	

On live stock in barn, yard, or field, no one animal to be valued at more than two hundred dollars, ($200) $
On
On

The above-described property being located in the town of , section , range , county of , State of , on side of street, No. , block No. , lot No. .

For a more particular description, reference is had to the application and survey, No. , on the files of this company, which is hereby made a part of this policy.

Term, . Total amount, . Rate, . Premium, $.

And said company hereby agree to make good unto the said assured, executors, administrators, and assigns, all such immediate loss or damage, not exceeding the sum insured as may occur by fire or lightning to the property specified, except as hereinafter provided, from the day of , 18 , at 12 o'clock noon, to the day day of , eighteen , at 12 o'clock noon, to be

paid within sixty days after due notice and satisfactory proof of the same, it being covenanted as conditions of this contract that the company may repair, restore, or replace the property lost or damaged, on giving notice of such intention within thirty days after the receipt of proofs herein required; and that this company shall not be liable for loss by theft at or after a fire; nor for loss caused by invasion, insurrection, riot, civil commotion, military or usurped power; nor for loss caused by explosions of any kind, except lightning, unless fire ensues, and then for the loss by fire or lightning only; nor for loss or damage caused by neglect to use all practicable means to save and preserve the property from damage at and after the fire; nor for loss or damage to the property of any other party, unless the interest of such party is stated in this policy, and there can be no abandonment to the company of the property insured. The assured shall not recover or demand of this company any greater portion of the loss or damage than the amount hereby insured shall bear to the whole sum insured on said property; nor in any event any greater sum than shall be equal to the interest of the assured in the property hereby insuree at the time of its loss or damage by fire or lightning. The company may at any time cancel this policy, returning the unexpired premium, pro rata, and the assured may cancel by paying the customary short rates for the expired time.

If the assured, in the written or verbal application for insurance, makes any false or erroneous representation material to the risk or relative to his title or ownership of the property insured on the ground upon which the premises insured are located; or if there is any neglect or deviation from the laws or police regulations made to prevent accidents from fire; or if there is attempt on the part of the assured to defraud this company; or if the occupancy of the property is transferred or changed; or if occupied at the time of making the insurance it afterwards becomes vacant and unoccupied; or if there is any prior or subsequent insurance, or the policy is assigned, or the risk is increased by any means within the control of the assured, then, and in every such case, this policy shall be void, unless the written consent of the company hereon endorsed shall have been had to such becoming vacant, change of occupancy, prior or subsequent insurance, assignment of policy, or increase of risk.

Permission is given to use for lights gas, kerosene or coal oil.

This policy is designed to apply only to dwelling houses and contents, farm property, churches, school-houses, colleges, and court-houses, and will be void if the premises insured or containing the property insured are used or occupied for any other purpose whatever, and shall not be assigned except by the written consent of the company hereon endorsed.

All persons having a claim under this policy shall proceed at once to put the property saved in the best order possible, separating the damaged from the undamaged, and shall give immediate written notice to the company or their agent, and render a particular account thereof, with an affidavit stating the time, origin, and circumstances of the fire, the occupancy of the building insured or containing the property insured, the whole value and ownership of the property insured, the amount of the loss or damage upon each article, other insurance, if any, and a copy of all policies, if required; shall produce books of account and other proper vouchers, and be examined under oath touching all questions relating to the claim, and shall subscribe to the same; and until sixty days after such proofs are rendered (duly attested by affidavit of claimant, and also by affidavits of two disinterested and re-

spectable men who are acquainted with the premises insured and the claimant, and by certificate of nearest magistrate that the statements are true), the loss shall not become payable; and if the assured or person making claim under this policy shall make any false or misleading statement in such examination or affidavit, then all claim under this policy shall be forfeited. In no case shall the claim be for a greater sum than the actual damage or cash value at the time of the fire. Assignors, unless the assignee owns the property, must prove claims to be valid. If differences of opinion should arise between the parties hereto as to the amount of loss or damage upon property partially damaged, the subject shall be referred to two disinterested and competent men, each party to select one [and in case of disagreement they to select a third], who shall, under oath, ascertain, estimate, and appraise such partial loss or damage upon each article separately; and their award in writing shall be binding upon the parties hereto, each party paying one-half of the expenses of reference.

N. B.—Books of account, securities for money, evidence of debt, notes, bullion, bills, watches, sewing and knitting machines, plate, furniture, money, jewels, jewelry, precious stones, metals, paintings, engravings, patterns, casts, models, sculptures, statuary, curiosities, musical and scientific instruments are not insured unless particularly mentioned in the policy.

If a note is given for the premium, or any portion thereof, and said note is not paid at maturity, according to its terms, this policy shall be void so long as the same remains unpaid, unless payment has been duly extended by consent of this company in writing.

No contract for insurance shall be binding until the actual payment of the premium has been made.

This policy is made and accepted upon the above express conditions, but shall not be valid until duly countersigned by the authorized agent of the company at

In witness whereof the Great Western Insurance Company have caused these presents to be signed by their president and attested by their secretary, in the city of Chicago, Ill.

Attested:

C. D. HOOKER, *Secretary.* H. L. STEWART, *President.*

Countersigned at this day of 18 .

Agent.

[1] Farm and dwelling policy, printed form.

243 (On back:)

GREAT WESTERN INSURANCE COMPANY.

Organized as a union or co-operative company. Central office, Chicago, Illinois. Branches in the principal cities and towns of the West. Proposed capital, $5,000,000; subscribed capital, $1,000,000. Officers: H. L. Stewart, president; Jacob R. Shiperd, treasurer; R. J. Waters, vice-president.

☞This policy is not assignable for purposes of collateral security, but in all such cases it is to be made "payable in case of loss, to," etc., by endorsement on its face. In case of actual sale or transfer of title,

leave being previously obtained, the form subjoined may be used, which must be executed at the time of said transfer.

The Great Western Insurance Company hereby consent that the interest of in the within policy, subject to all the terms and conditions therein mentioned and referred to, be assigned to

, 18 .

Agent.

For value received, hereby transfer, assign, and set over unto and assigns, title and interest in this policy, and all advantages to be derived therefrom, subject to all the terms and conditions therein mentioned and referred to.

Witness hand and seal this day of 18 .

Sealed and delivered in presence of

[STAMP.] *Insured.*

The Great Western Insurance Company hereby consent that the interest of in the within policy, subject to all the terms and conditions therein mentioned and referred to, be assigned to

, 18 .

Agent.

For value received, hereby transfer, assign, and set over unto and assigns, title and interest in this policy, and all advantages to be derived therefrom, subject to all the terms and conditions therein mentioned and referred to.

Witness hand and seal this day of 18 .

Sealed and delivered in presence of

[STAMP.] *Agent.*

(Indorsed:) No. . Great Western Insurance Co. of Chicago. Assured, . Amount, $; premium, $; policy and survey, $. $. Expires, 18 . Premises, . , Agent. Stamp: 10 cents for $10.00 or less; 25 cents for $50.00 or less; 50 cents for over $50.00.

244 The plaintiff next offers in evidence a copy of Joslin and Park's bond, to which the defendant objected on the grounds of its being immaterial, irrelevant, and incompetent. Objection overruled by the court to which the defendant excepts.

Here follows copy of bond.

GREAT WESTERN INSURANCE COMPANY.

No. 1890.] [$

Organized July 20th, 1857, under act of legislature approved M'ch 4, '57. Capital stock $500,000 with liberty to increase to 5,000,000 dollars.

[Stamp.]

Know all men by these presents that for and in consideration of shares of the capital stock of the Great Western Insurance Co., of Chi-

cago, Ill's, received by me, I am held and firmly bound and agree to pay the Great Western Ins. Co., of Chicago, the sum of two hundred dallars in installments as follows: twenty-five per cent. thereof on receipt of stock certificate, twenty-five per cent. in three months from date hereof, twenty-five per cent. six months from date hereof, twenty-five per cent. nine months from date with interest 10 per cent after due.

Cheyenne, February 23, 1871.

JOSLIN AND PARK.

(On margin:) non-assessable.

Signed and delivered in presence of—

Plaintiff next offers in evidence three letters, two of which are from Hooker the sec.; one from sp'l ag't Long.

(To each of which the defendant objects on the grounds of their being immaterial, irrelevant, and incompetent. Objection overruled by the court to which the defendant excepts.)

Here follows copies of letters referred to.

245 DENVER, COL., *June* 6, 1871,

T. A. KENT, Esq.,
Manager Cheyenne B. G. W., Ins. Co., Cheyenne, W. T.

DEAR SIR: Your esteemed favor of 5th inst. at hand; contents noted. I will endeavor to see Mr. Hausman here to-day. I enclose you letter from company under date of 3rd by which you will see the co. desire Mr. P. put through. Confer with Judge McLaughlin and if thought advisable attach Peirce's interest in press or anything else that can be found, and replevy supplies if the list sent for has come to hand; do whatever is necessary to protect our interest; company will indorse your action in the premises. I also send letter received from auditor's office relative to money loaned in Iowa in answer to letter written by me at your office on the eve of leaving. I will try and be with you to-morrow, if not send any letters by trains.

Very truly,

THOS. W. J. LONG,
Sp'l Ag't G. W. Ins. Co.

CHICAGO, *May 30th*, 1871.

THOMAS W. J. LONG, Esq., *Denver, Col. T'y:*

DEAR SIR: We have nothing new to offer. You know even better than ourselves how to act; push Pierce and Holden both to the wall. They do not deserve any mercy at our hands, and now we do not propose to spare any expense or time to bring them up standing. We need not tell you how to act in the premises. Major Long fully under-
246 stands his business & positive the company here will endorse your actions.

Very truly,

C. D. HOOKER, *Sec'y.*
ABBOTT.

CHICAGO, *July* 21, 1871.

T. A. KENT, Esq.,
Cheyenne, W. T.:

DEAR SIR: In reply to your favor of the 17th inst. would say we have written Major Long to return to this office (he being in Ken-

tucky at present) at once, and will have him visit you and more than that propose to have him remain with Pierce until he (Pierce) is perfectly satisfied that we mean business. We shall instruct the major to leave no stone unturned but crowd him to the wall; we have all the trouble we desire with him and we now propose to make the following proposition: "Come down or stand from under," in other words pay up in full, return all papers, or we shall force him so to do. Collections will be made through you and herewith hand you statement. Make all collections that are due and remit.

Resp. yours,

C. D. HOOKER, *Sec.*

Plaintiff rests.

The defendant to maintain the issues on his part testifies as follows:

Reside in Cheyenne since August 5th, 1867, continuously; citizen of Territory all the time. Have known nothing of the laws of Illinois during that time, up to commencement of this suit, nor now.
247 Did not have any information as to the provisions of the laws of that State or any of them relative to insurance co's up to commencement of this suit. Great Western Insurance Company was indebted to me at the commencement of this action for Great Western

Insurance Co. vs. H. A. Pierce	$200 00
Office rent May 20, '71 to Aug. 15, '72, 50 p'r month	$744 66
Sale of $42,500 worth stock 3 %	1,275 00
Serving notices and making collections	50 00
Money paid in excess of bonds	400 00

I had a contract to sell $50,000 worth of stock with Mr. Long, special agent Great Western Insurance Co., and sold $42,500. Didn't sell any more because of the fire. I did the work. I made these sales from May 20, 1871, until Aug. 15, 1872, at this branch. Pierce was formerly agent and there was some dissatisfaction with him at this branch. He was ordered to turn over books and papers to me, but refused and I was engaged running after him and trying to get them attending replevin suit; was engaged about two months; charge is a reasonable one regarding the item of rent. My store was used as office and my safe for books and papers belonging to the company, from May 20, 1871, to August 15, 1872, at Long's request for company.

Cross-examination:

Have resided in Cheyenne since '67 all the time. Was in Chicago once, two years ago last September. Have been in business here with parties in Chicago. Have done large business with such par-
248 ties, perhaps between 2 and $300,000. Railway was completed in Cheyenne sometime in '67. Has been connected with Chicago since '70. There has also been telegraphic communication with Chicago since same time. Was in communication with home office sometimes daily, sometimes weekly, as often as once a week. I talked with Mr. Long about the laws of Ill's. Made no effort outside of this talk with Long.

Defendant rests; testimony closed.

The foregoing is the evidence and all the evidence in the case given by both parties.

The plaintiff by his attorney requested the court to give the following instructions to the jury:

Great
1st. This is an action brought by the plaintiff as assignee of the ? d to Western Insurance Co. to collect a balance of sixty per cent. alleged to be due upon stock in that company held by the defendant to the amount of twenty shares of one hundred dollars each; forty per cent. on such stock having it is alleged already been paid by the defendant.

2. Defendant alleges in his answer in substance that he became a stockholder in said company, if at all, by virtue of a certain contract which bound him to pay for stock purchased only 20 per cent. of its par value and released him from all further liability as owner or holder thereof, and further alleges that having paid said 20 per cent. and in this case even more, he has fully discharged all obligations in-
249 cumbent upon him under his said contract. Defendant also alleges that he entered into such contract by reason of false statements of certain agents of the company upon which he relied, and in consequence thereof, claims to be released from liability to the assignee and creditors of said company.

(To the giving of the said second instruction, the defendant objected. Objection overruled by the court to which the defendant excepted at the time said instruction was given.)

3. You are instructed that if defendant authorized his name to be used as a subscriber for stock and authorized his name to be placed on the stock books of the company, as a stockholder, or accepted and received certificates of stock from the company, the relation of stockholder was thereby created entitling him to all the benefits of that relation and casting upon him all the responsibilities and liabilities thereof.

(To the giving of the said 3d instruction the defendant objected. Objection overruled, to which the defendant excepted at the time said instruction was given.)

4th. So if the company knowing that defendant was the owner of stock, whether by subscription or purchase, and accepted him, as such by placing his name upon the stock books of the company, whether he requested them to do so or not, that the relation of stockholders with all its incidents was thereby created.

(To the giving of the said 4th instruction the defendant objected.
250 Objection overruled, to which the defendant excepted at the time said instruction was given.)

5th. So if you find from the evidence that defendant subscribed for stock of the company or authorized his name to be sent to the company as a subscriber to its capital stock, whether such authority was given by him orally or in writing, and that he thereafter received the evidences of his ownership in the form of certificate he thereby became a stockholder and liable as such.

(To the giving of the said 5th instruction the defendant objected. Objection overruled, to which the defendant excepted at the time said instruction was given.)

6th. The assignee of stock is liable for calls made after he has been accepted by the company as a stockholder and the issuance to him of a new certificate in lieu of the one transferred. Or with the knowledge of such transfer the placing of his name upon the books of the company by it constitutes an acceptance of him as a stockholder and makes him liable as such. If therefore you find from the evidence in this case that defendant did purchase from Joslin & Park ten shares of the capital stock of the company held by them; that *that* the company placed his name upon their books, or issued to him a new certificate in lieu of the one so purchased, you are instructed that he thereby became a stockholder in said company and liable, as such.

(To the giving of the said 6th instruction the defendant objected. Objection overruled, to which the defendant excepted at the time said instruction was given.)

7th. The stockholders and corporators of the Great Western
251 Insurance Company of Chicago, were severally liable for all debts of the company to the amount of stock by them subscribed and owned, and were liable for all calls thereon for the purpose of paying such debts, until the entire amount so owned by them had been paid in and were so liable without any express promise to that effect, and any contract between the company or its agents, and thus limiting their liability thereon to 20 per cent., or any sum less than the face or par value of the same is void, both as to the creditor of the company and its assignee in bankruptcy.

If therefore, you find from the evidence in this case that defendant, T. A. Kent, became a stockholder of the Great Western Insurance Company either by subscription or purchase, and that he continued to own and hold said stock until after the insolvency of the company, he is liable as such stockholder to the creditors of the company, or their representatives, the assignee, to the full amount of stock so owned or held by him, and any representation or agreements by, or with the company or its agents limiting his liability to 20 per cent. of the stock or any endorsement on the stock of the word non-assessable are wholly immaterial and constitutes no defence whatever to this action. It was not in the power of the company or its agents to release him from the smallest portion of his obligation as stockholder to the creditors of the company by any agreement, however solemn, or any device, however injurious.

(To the giving of the said 7th instruction the defendant objected. Objection overruled, to which the defendant excepted at the time said instruction was given.)

8th. The law of a place to which a contract is made subject en-
252 ters into and becomes part of it and whatever parties may stipulate they necessarily contract with reference to the law governing them and the contract, and are bound to know it, or at least bound by it whether they know it or not and cannot be heard to urge ignorance of the law as an excuse or defence.

(To the giving of the said 8th instruction the defendant objected; objection overruled, to which the defendant excepted at the time said instruction was given.)

9. The Great Western Insurance Company was a corporation organized under the laws of Illinois. It had no life or power except such as were conferred by the laws of that State. Its limitations and liabilities and those of its stockholders were imposed by the same laws. Any person becoming one of its corporators by subscription or purchase of stock, voluntarily subjected himself to the liabilities and incidents of that relation imposed by those laws, and was at least bound to use care, attention and dilligence to ascertain his position. A representation of what the law will or will not permit to be done is one on which a party to whom it is made has no right to rely, and if he does so it is his own folly from the consequences of which the law will not relieve him. If in this case you find from the evidence that T. A. Kent became a stockholder in this company on or about the 1st of January, 1871, and had notice by the statement on the face of his certificate of stock, or otherwise, that as such stockholder he was subject to the laws of the State of Illinois, and that he did not at once and diligently proceed to ascertain his position and responsibilities as such under those laws and make his choice of retaining his position or aban-

doning it, but neglected to do so until the commencement of this
253 suit, in that case the law refuses him a remedy and his defense
of false statements as to the legal effect of his contract by which he was induced to become a stockholder can avail him nothing and constitutes no defense whatever to this action and should be disregarded by you entirely.

(To the giving of the said 9th instruction the defendant objected; objection overruled, to which the defendant excepted at the time said instruction was given.)

10. The contract by which the stock was to be non-assessable after the payment of the first 20 per cent. thereof, though it might bind the company in an action between itself and a stockholder, is not valid or binding as between its assignee in bankruptcy and the holder of stock and constitutes no defense to an action by him for the full amount of the stock or the unpaid portion thereof.

(To the giving of the said 10th instruction the defendant objected; objection overruled, to which the defendant excepted at the time said instruction was given.)

11th. Fraudulent representations, even if made by the company or its agents in procuring subscriptions for stock, cannot be set up as a defense to the recovery on the stock by the creditors of the company or their representative, the assignee in bankruptcy.

(To the giving of the said 11th instruction the defendant objected; objection overruled, to which the defendant excepted at the time said instruction was given.)

12th. The certificate of stock and the bond given to secure the payment of the first twenty per cent. due thereon must be taken and construed together and not as separate or independent contracts, and if you find from the evidence in this case that T. A. Kent in consideration of his receiving ten shares of the capital stock of the Great Western Insurance Company, of the par or expressed value of one hundred dollars each, gave his bond to said company for $200 or 20 per cent.
254 thereof, and that at or about the same time accepted a certificate for 10 shares of such stock, then, in that case, you are instructed that the payment by said Kent to the company of the full amount of the bond is but the liquidation of a portion of the sum due on the stock held by him and constitutes no defense to an action by the assignee to recover the balance due thereon upon assessment lawfully made, and the defendant is liable in this action for the full amount unpaid and due on said stock to the same extent and with like effect as if said bond had not been given.

(To the giving of the said 12th instruction the defendant objected; objection overruled, to which excepted at the time said instruction was given.)

13th. The set-off or counter-claim interposed by the defendant to the plaintiff's action as stated in his petition constitutes no defense to the action, nor can it be allowed as against the assignee, and all evidence in regard thereto should be disregarded by you in making up your verdict.

(To the giving of the said 13th instruction the defendant objected; objection overruled, to which the defendant excepted at the time said instruction was given.)

14th. The expressed or par value of each share of the capital stock of the Great Western Insurance Company as stated on the face of its certificate was, under its charter, one hundred dollars for each and every share, and if the jury find the issue for the plaintiff they will as-

sess b[illegible] damages by taking the expressed or par value of such stock balan[illegible]ce, they will compute interest at the rate of six per cent. per an[illegible]m from the 15th day of August, 1872, the date of the assessment by the court, became due and payable to the present time.

255 (To the giving of the said 14th instruction the defendant objected; objection sustained, to which the plaintiff excepted at the time said instruction was given.)

The defendant, by his attorney, requested the court to give the following instructions to the jury:

1. The law frequently supplies by implication the wants of express agreements between parties but it never overcomes by its implications the express provisions of parties. (2 Parsons on Contracts, 515.)

The court refused to give instruction No. 1, to which the defendant excepted.

2. If the express provisions of a contract are legal the law yields to them and does not put in their stead what it would have put by implication if the parties had been silent. (Ibid.)

The court refused to give instruction 2, to which the defendant excepted.

3. It is well settled that the law will not make nor permit to be made for parties a contract other than that which they have made for themselves. If, from the terms employed, the intention and meaning of the parties can be fairly ascertained and determined, then the express terms will govern and in this sense will be enforced as the contract which the parties have made.

(2 Parsons on Contracts, 560 and 562.)

4th. In the present case the plaintiff seeks to recover upon a contract alleged to have been entered into between the Great Western Insurance Company and the defendant; and before he can recover he must

256 establish the mutual averments in the petition by a preponderance of testimony. Therefore if there is a material variance between the contract alleged and the contract proven the plaintiff cannot recover.

See Ney's Code, pp. 227 et. seq., notes 4, 5, 7, 10, 11, 15, 16, 20.

C. 1, Greenleaf on Evidence, § 66, note 1.

5th. The courts of this Territory are not presumed to know the laws of the State of Illinois, or of any other State, and cannot take judicial knowledge of them until they are legally proven. Private citizens of the Territory are held to no greater knowledge of the laws of other States than the courts, and are not presumed to know the provisions of the laws of other States. It may be proven that they have knowledge of those laws, or that by the exercise of due diligence, which they were bound to exercise, they might have known them. (Havews vs. Foster, 9 Pick., 112).

The court refused to give instruction No. 5, to which the defendant excepted.

6. Before the defendant, Kent, can be made liable in this action upon the stock which it is alleged that he purchased from Joslin and Park, it must have been shown that his name has been registered on the stock-books of the company issuing the stock as a corporation.

The court refused to give instruction No. 6, to which the defendant excepted.

7. Unless the stock alleged to have been purchased from Joslin and Park by the defendant, Kent, was transferred to Kent on the books of the company which issued the stock, or such transfer has been waived, the defendant, Kent, is not liable for any assessment upon such stock.

The court refused to give instruction No. 7, to which the
257 defendant excepted.

8th. That as to all the material allegations in the plaintiff's petition, which are denied by the defendant' answer, they must be proved by a preponderance of evidence to entitle the plaintiff to recover in this action, and if they are not so proved, then you should find for the defendant.

9th. The jury are the exclusive judges as to whether any fact put in issue by the pleadings has been proved.

The court refused to give instruction 9, to which the defendant excepted.

The court upon its own motion instructed the jury as follows:

GENTLEMEN OF THE JURY: In the trial of this case a large range of evidence was allowed, and much testimony admitted which turns out not to be of any special importance from the fact that the issues involved in this case are not 'resented in such a way as that very much of the evidence which has been given is at all material It will be remembered that I stated at the commencement of the trial that I had overruled the demurrer which has been filed to defendant's answer, for the reason that several cases of a character similar to this were pending in the Supreme Court of the United States, and that I wished to have all the light which the decisions of those cases would throw upon the questions at issue. That in overruling the demurrer I reserved the right to pass upon the questions as they might arise on the trial, or before the case should be submitted to you. When the case was called for trial it was found that the defense set up in defendant's an-
258 swer remained on the record practically confessed. Leave was then given to the plaintiff to file a replication to defendant's answer, and thus raise an issue upon it. I then opened the door to both parties to introduce a large amount of evidence, and I now have become fully satisfied that a large portion of this evidence should not have been admitted, and is now ruled out. I proceed to state the issues as they will be submitted to you after the irrelevant and immaterial matter are stricken from the records.

It is shown by the evidences that the Great Western Insurance Co. was duly incorporated by virtue of the laws of the State of Illinois; that an agent of the co. came to this Territory to procure subscriptions and establish a branch office at Cheyenne. The petition of plaintiff alleges further that the defendant in this action became a subscriber to the amount of ten shares. The par value of these shares was one hundred dollars each, on which several payments have been made, and also claiming that a large portion of the subscription yet remains due and unpaid. The petition further alleges that the defendant purchased or in some way became liable for a like sum alleged to be due on ten shares subscribed for by Messrs. Joslin and Park, amounting in the aggregate to the sum of $1,200.00, with interest at the rate of 12 per cent. per annum from the date at which the unpaid portion of the subscription became due. To these allegations the defendant has filed an answer, admitting that the Great Western Insurance Co. is a body corporate, and that he did subscribe for ten shares of the capital stock of said company, but alleges that he did not become liable for any sum of money beyond the sum of $200.00 under a contract of subscription, and
259 denies all the other allegation' of plaintiff's petition. The defendant, secondly, sets up a defense that he was unacquainted with law of Illinois under which said co. was incorporated, and that

if he ever was by reason of such subscription liable for the whole amount of the par value of the stock that there were such fraudulent representations made to him to induce his subscription as removes all liability on account of the subscription. Thirdly, defendant sets up a counter claim which considerably overbalances the claim of plaintiff, and which, if allowed, would result in a verdict for the defendant. Now there are certain questions of fact to be passed upon, all of which I leave to you, but I apprehend that the main question to be determined is one of law, and you are to dispose of questions of law as they are given you by the court, and if they are given wrongfully there is another tribunal to correct them, but you must take them as above to be given. First, then, it is confessed that the Great Western Insurance Co. was a corporation. That question is settled. It is also settled by the answer that the defendant became the owner of ten shares of the capital stock sometime in the early part of the year 1871, and that he subsequently the owner of ten shares originally subscribed for by Joslin and Park. The petition alleges that in consequence of losses, &c., the co. became so involved that it was unable to meet its liabilities, and was, by petition duly presented, forced into bankruptcy, and that Mr. C. W. Upton was appointed by the district for the northern district of Illinois assignee in bankruptcy. The proofs of the proceedings to place the company in bankruptcy is, perhaps, a question for the court to determine;
260 if so, all I have to say on that subject is that I find them all regular, and in accordance with the requirements of the bankrupt act of Congress of March, 1867, relating to bankruptcy, and its several supplements. But I submit it to you as a matter of fact to say whether the proofs sustain that allegation. I may remark that there is but little attempt at denial. Then the fact of the subscription to the capital stock to the amount of ten shares, and the subsequent possession of ten more shares from Joslin and Park being admitted, it becomes a question of fact as to what was the par value of the stock. This you will find from the pleadings, and when that question shall have been disposed of, you are next to find how much has been paid per share. This inquiry will determine the amount still due, because I now instruct you as a matter of law that you are to disregard all other questions.

It is altogether likely, in fact highly probable, from the well-known high standing of Mr. Kent in this community, that his statements in regard to the inducements held out to him to become a contributor to the capital stock of the Great Western Insurance Co. are strictly true. It is also no doubt true that Mr. Kent subscribed for the stock without knowing the nature of the laws of the State of Illinois. But none of these things can be successfully pleaded so as to release him from his obligations to pay the full par value of the stock. It may be that ignorance of the laws of Ills. might be plead in bar to some actions against non-residents of that State, but such want of knowledge can avail him nothing in this action; nor can he set up a contract of the nature
261 of the one set out in the answer to relieve him of his obligation, because when he became a subscriber to the capital stock of the Great Western Insurance Co. he became one of the corporators, entitled to participate in all its proceedings, share its profits and assume its liabilities just the same as he would have done if he were a citizen of Illinois. In other words, had he entered into a partnership in a commercial or any other enterprise to be carried on in the city of Chicago, and the members of the firm by their business operation had become embarrassed, Mr. Kent would have been bound for the liabilities of the firm in the same manner and to the same extent, as the active

business managers of the partnership, although he had never been in Chicago. If that is the case with an ordinary association of men in a business adventure why should Mr. Kent be treated in any other way when associated with other members of a firm working under a charter of incorporation? Because an incorporated partnership, working under charter for the convenience of doing business by a president and board of directors, is neither more nor less than a partnership; hence it cannot avail the defendant in this action to plead ignorance of laws which he had an opportunity to know, and which he was compelled to know or take the consequences of his own neglect. This plea might have been set up if suit had been brought by the corporation to recover the balance of the par value of the shares of stock held by the defendant so; also, might be set up the contract which he signed under such an action brought not by the corporation but by the creditors, by

262 their agent, Mr. Upton, who has been made the receiver for the creditors, and is bound by virtue of his commission as assignee to marshal the assets of the corporation, *but* of its constituants, and when so marshaled to pay the corporation debts. There is this difference between an incorporated co. and an ordinary copartnership, while under the latter one of its members may become liable for all the debts of the firm, here he is only liable to the amount of this unpaid subscription. In some States a member of a corporation becomes liable to creditors for all the debts of such corporation, but that extent of liability is not claimed in this case, but only to the amount of his subscription to the capital stock; to this amount I say to you, as a question of law, he is unquestionably liable. There are several questions which I might call your attention to, but a careful examination of the instruction asked and given on the part of the plaintiff render special instructions upon these points unnecessary. Finally I submit to you the only questions on which you are to pass upon, all others being withdrawn from you. These questions are as follows:

1st. Did the defendant subscribe for ten shares of the capital stock of the Great Western Insurance Company?

2d. Did the defendant become the holder and owner of ten other shares originally subscribed for by Messrs. Joslin & Park?

3rd. Was the par value of that stock one hundred dollars?

4th. If you shall find from the evidence that he did so subscribe for the stock and did become the owner and holder of Joslin & Park's stock, you will find—

263 5. How much has he paid on his first ten shares and how much has been paid on Joslin & Park's ten shares; and how much remains due. And if you find that amount, this will have to be the amount of your verdict, such rate as you shall find proven if any rate has been proven. In specifying the issues on which you are to pass, you will understand that all questions other than these are taken from you and upon which you are not to pass, and if there be error in so doing it is the error of the court and not yours. I conclude by saying that the burden is thrown upon the plaintiff to establish the allegations of his claim by a preponderance of evidence before he can recover. But when he has so established his claim he has an undoubted right to a verdict. Otherwise your verdict should be for defendant. I dismiss the counter-claim or set-off, as one of the things with which you have nothing to do, so that nothing more need be said on that question. The form of your verdict will be substantially as follows:

C. W. th... UPTON, ASSIGNEE IN BANKRUPTCY OF ...e Great Western Insurance Company,
vs.
THOMAS A. KENT.

We, the jury in the above-entitled case, find for plaintiff and assess his damages at .
Dated, &c.

Foreman.

Or if the case is not made out by a preponderance of evidence on the part of plaintiff you state the caption in the same way and say we find for defendant. Before dismissing this case I feel that I ought to say
that may seem a hardship to Mr. Kent to refuse him the right
264 to set up his claim for services rendered the company is not so, but it must be remembered that this is not an action between the Great Western Insurance Co. and Mr. Kent, but it is an action between the creditors of the insurance co., by their representative, Mr. Upton, and the stockholders, and if Mr. Kent has an allowable claim he can present it to the assignee and receive the dividend to which he is entitled, or all if the assets should be sufficient to pay the company debts. Otherwise, if Mr. Kent and other stockholders may set up claims of this character, they might defeat the object of forcing the company into bankrupty for the relief of the creditors and sink the corporation still deeper in debt. Much has been said about the bad management of the directors of the Great Western Insurance Co., and it has been charged with dishonest practises. This is a matter with which you have nothing to do. Neither have you anything to do with those who have lost by having taken policies of insurance in the company. All you have to decide is did Mr. Kent become a subscriber to its stock in the manner stated in the petition. If so, was the par value of the stock one hundred dollars per share? If so, how much has he paid on account of that subscription, and how much remains unpaid? An answer to these questions the law of the land says that this sum is the amount of the verdict which the plaintiff is entitled to, with such interest as you may allow. While, on the other hand, if the plaintiff has not satisfied you by a preponderance of evidence on each of these points your verdict should be for the defendant. I should here explain
what may appear to you as an indefinite statement on the subject
265 of interest allowed on whatever you may find to be due on the defendant's subscriptions to the capital stock of the Great Western Insurance Co. In a case tried in this court in the May term I decided that on the trial of a case where the indebtedness arose in a foreign state and no evidence was given on the subject of interest that the rate of interest established in this Territory should govern in the computation of interest. I now have strong reason to doubt the correctness of that ruling and have come to the conclusion to rely upon the evidence on the subject of interest computation, and on that alone, so if no interest has been proven none can be allowed.

The defendant, by his attorney, duly excepted to the giving of the following instructions given by the court on its own motion to the jury at the time said instructions were given:

1st. From and including line 12 on page two down to and including a portion of line eighteen on same page, which reads as follows: I then at the commencement of the trial opened the "door to both parties to introduce a large amount of evidence, and I now have be-

come satisfied that a large portion of this evidence should not have been admitted, and is now ruled out."

The defendant excepted to giving of the following instruction given on motion of the court to the jury when said instruction was given.

2. From and including line 24 on page 2 of said instructions down to and including line 6 on page 4, which reads as follows:

"It is shown by the evidence that the Great Western Insur-
266 ance Co. was duly incorporated by virtue of the laws of the State of Illinois; that an agent of the co. came to this Territory to procure subscriptions and establish a branch office at Cheyenne. The petition of plaintiff alleges further that the defendant in this action became a subscriber to the amount of ten shares of the stock. The par value of these shares was one hundred dollars each, on which several payments have been made; and also claiming that a large portion of the subscription yet remains due and unpaid. The petition further alleges that the defendant purchased or in some way became liable for a like sum alleged to be due on ten shares subscribed for by Messrs. Joslin and Park, amountin' in the aggregate to the sum of $1,200.00, with interest at the rate of 12 per cent. per annum from the date at which the unpaid portion of the subscriptions became due. To these allegations the defendant has filed an answer, admitting that the Great Western Insurance Co. is a body corporate, and that he did subscribe for ten shares of the capital stock of said company, but alleges that he did not become liable for any sum of money beyond the sum of $200 under a contract of subscription, and denies all the other allegations of plaintiff's petition."

The defendant excepted to giving of the following instruction given on motion of the court to the jury when said instruction was given.

3d. From and including line 17 on page four of said instructions down to and including line 3 on page five, which reads as follows:

"The defendant, secondly, sets up a defense that he was unac-
267 quainted with laws of Illinois under which said co. was incorporated, and that if he ever was by reason of such subscription liable for the whole amount of the par value of the stock that there were such fraudulent representations made to him to induce his subscription as removes all liability on account of the subscription.

Thirdly. Defendant sets up a counter-claim which considerably overbalances the claim of plaintiff, and which, if allowed, would result in a verdict for the defendant.

The defendant excepted to the giving of the following instruction given on motion of the c't to the jury when said instruction was given:

4th. Lines 15 and 16 on page six which reads as follows: "I may remark that there js but little attempt at denial." The defendant excepted to the givin' of the following instruction given on motion of the court to the jury when said instruction was given.

5. From and including line 17 on page six of said instructions down to and including line five on page 7, which reads as follows: "Then the fact of the subscription to the capital stock to the amount of ten shares and the subsequent possession of ten more shares, from Joslin and Park being admitted, it becomes a question of fact as to what was the par value of the stock; this you will from the pleadings, and when that question shall have been disposed of you are next to find how much has been paid per share. This inquiry will determine the amount still due, because I now instruct you as a matter of law, that you are to disregard all other questions." The defendant excepted to

the giving of the following instruction given by the court on its own
268 motion to the jury when said instruction was given:

From and including line six on page seven of said instructions down to and including the word subscriptions on line eleven of page ten, which reads as follows:

"It is altogether likely, in fact, highly probable, from the well-known high standing of Mr. Kent in this community, that his statements *are* regard to the inducements held out to him to become a contributor to the capital stock of the Great Western Insurance Co. are strictly true. It is also no doubt true that Mr. Kent subscribed for the stock without knowing the nature of the laws of the State of Illinois; but none of these things can be successfully pleaded so as to release him from his obligation to pay the full par value of the stock. It may be that ignorance of the laws of Illinois might be pleaded in bar to some action against non-residents of that State, but such want of knowledge can avail him nothing in this action. Nor can he set up a contract of the nature of the one set out in the answer to relieve him of his obligation, because when he became a subscriber to the capital stock of the Great Western Insurance Co. he became one of the corporators, entitled to participate in all its proceedings, share its profits, and assume its liabilities, just the same as he would have done if he were a citizen of Illinois. In other words, had he entered into a partnership in a commercial or any other enterprise to be carried on in the city of Chicago, and the members of the firm by their business operations had become embarrassed, Mr. Kent would have been bound for the liabilities of the firm in the same manner and to the same extent as
269 the active business managers of the partnership, although he had never been in Chicago. If that is the case with an ordinary association of men in a business adventure, why should Mr. Kent be treated in any other way when associated with other members of a firm working under a charter of incorporation, because an incorporated partnership working under a charter for the convenience of doing business by a president and board of directors is neither more nor less than a partnership; hence it cannot avail the defendant in this action to plead ignorance of laws which he had an opportunity to know, and which he was compelled to know or take the consequences of his own neglect. This plea might have been set up if suit had been brought by the corporation to recover the balance of the par value of the shares of stock held by the defendant, so also might he set up the contract which he signed under such an action, but this is an action brought, not by the corporation but by its creditors, by their agent, Mr. Upton, who has been made the receiver for the creditors, and is bound by virtue of his commission as assignee to marshal the assets of the corporation, and not only of the corporation but of its constituents, and when so marshaled to pay the corporation debt. There is this difference between an incorporated co. and an ordinary copartnership, while under the latter one of its members may become liable for all the debts of the firm, here he is only liable to the amount of his unpaid subscriptions."

The def't excepted to the giving of the following instruction given on motion of the c't to the jury when said instructions was given:

From and including line 11 on page 10 of said instruction down
270 to and including line 19 on same page, which reads as follows:

"In some of the States a member of a corporation becomes liable to creditors for all the debts of such corporation, but that extent of liability is not claimed in this case, but only to the amount of his sub-

scription to the capital stock; to this amount I say to you, as a question of law, he is unquestionably liable."

The defendant excepted to the giving of the following instruction given on motion of the court to the jury when said instruction was given: From and including line 26 on page 10 of said instruction down to and including line 24 on page 11, which reads as follows:

"Finally I submit to you the only questions on which you are to pass upon, all others being withdrawn from you; these questions are as follows:

1st. "Did the defendant subscribe for ten shares of the capital stock of the Great Western Insurance Co.?"

2nd. "Did the defendant become the holder and owner of ten other shares, originally subscribed for by Messrs. Joslin & Park?"

3d. "Was the par value of that stock one hundred dollars?"

4th. "If you shall find from the evidence that he did so subscribe for the stock and did become the owner and holder of Joslin & Park's stock, you will find"—

5th. "How much has he paid on his first ten shares, and how much has been paid on Joslin & Park's ten shares, and how much remains due; and if you find that amount, this will have to be the amount of your verdict."

The defendant, by his attorney, then requested the court to submit to the jury the following request for special findings of fact; copy of said request is as follows:

271 1. Was the contract between the Great Western Insurance Company and the defendant the contract alleged in the answer by the defendant?

2. Did the defendant, at the time of making the contract, know the provisions of the statute laws of Illinois relating to insurance corporators and the liabilities of their stockholders, or did he know them at any time prior to the bankruptcy of the Great Western Insurance Company; and, under all the circumstances surrounding his relations, did he use reasonable diligence to learn what his liabilities were? Were the statements and representations of the Great Western Insurance Company, by and through its authorized agent, made to the defendant at the time he made the contract believed by the defendant and relied upon by him, and were such statements and representations untrue when made?

The court refuses to submit said request to the jury, to which the defendant excepted.

The jury thereupon retired, and, after deliberation, found a verdict as follows:

C. W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Co.,
vs.
THOMAS A. KENT.

We, the jury in the above-entitled case, find for plaintiff, and assess his damages at twelve hundred ($1,200.00) dollars.

Cheyenne, Wyo. Terr'y, Dec. 13th, 1876.

A. D. SHAKESPEARE,
Foreman.

272 Which said verdict is endorsed on the back as follows, to wit, No. 514. C. W. Upton, assignee, &c., Tho's A. Kent. Verdict. Filed December 13th, 1876. J. W. Bruner, clerk.

And afterwards, on the 16th day of February, A. D. 1877, was filed a motion for a new trial, in words and figures as follows:

TERRITORY OF WYOMING,
County of Laramie, ss:

In the district court, first judicial district.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, plaintiff.
vs.
THOMAS A. KENT, DEFENDANT.

Motion to vacate and set aside verdict and to grant a new trial.

And now comes the said defendant, Thomas A. Kent, by W. W. Corlett, his attorney, and moves the court now here to vacate and set aside the verdict of the jury heretofore rendered and filed in the above cause, and to grant a new trial for the following reasons, to wit:

1. Because said verdict is not sustained by sufficient evidence.
2. Because said verdict is contrary to law.
3. Because the court erred upon the trial of this cause in permitting the plaintiff to file a reply in the cause after the jury was empannelled and sworn, for the trial of the cause was proceeding to trial.

273 4. Because the court erred on the trial of this cause in overruling the defendant, motion to dismiss the cause after the reply was permitted to be filed.

5. Because the court erred on the trial of this cause in overruling the defendant's motion to order a non-suit in the cause after the reply was permitted to be filed.
6. Because the court erred in overruling the defendant's motion for a continuance of the cause after the reply was permitted to be filed.
7. Because the court erred on the trial of this cause in sustaining plaintiff's motion for leave to file a reply after the jury had been empannelled and sworn to try the cause.
8. Because the court erred on the trial of this cause in overruling defendant's objection to the introduction to the jury of the laws of the State of Illinois, so far as the same were offered in evidence by the plaintiff.
9. Because the court erred on the trial of this cause in admitting in evidence over defendant's objection proceeding incorporation the Great Western Insurance Company, and authorizing its capital stock to be increased to five million dollars.
10. Because the court erred on the trial of this cause in giving in evidence to the jury over the defendant's objection certified copy of annual statements of Great Western Insurance Company to the auditor of the State of Illinois.
11. Because the court erred on the trial of this cause in permitting to be given to the jury documents designated and numbered on the trial 3¼.

274 12. Because the court on the trial of this case erred in permitting to be given to the jury in evidence over defendant's objection, the deed of assignment to the plaintiff numbered 7.

13. Because the court erred on the trial of this cause in permitting to be given to the jury over defendant's objection the certificate copy

of notice alleged to have been published in the Chicago Daily Inter-Ocean.

14. Because the court on the trial of this cause erred in permitting to be given to the jury in evidence over defendant's objection the pamphlet publication alleged to have been prepared and distributed by the Great Western Insurance Company.

15. Because the court erred on the trial of this cause in permitting to be given to the jury in evidence over defendant's objections the certificate of stock.

16. Because the court on the trial of this cause erred in permitting to be given to the jury over defendant's objection alleged copy of list of stockholders at Cheyenne, and copy of original stock-book of Great Western Insurance Company.

17. Because the court on the trial of this cause in permitting to be given to the jury certified copy of notification to assignee of his appointment and his acceptance.

18. Because the court erred on the trial of this cause in giving to the jury severally instructions numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, as requested by the plaintiff, to the giving of each of said instructions the defendant at the time of giving of the same objected and excepted.

19. Because the court on the trial of this cause erred on the trial of this cause in given and refusing the instructions of the parties
275 to the cause, with oral qualifications, application and explanation.

20. Because the court erred on the trial of this cause in sending to the jury, when they retired to consider of their verdict, the instructions requested by plaintiff and numbered 14.

21. Because the court on the trial of this cause erred in severally refusing to give to the jury instructions requested by defendant, numbered 1, 2, 5, 6, 7, and 9, to the refusals of the court to give each of said instruction the defendant at the time of such refusals, the defendant, excepted.

22. Because the court erred on the trial of this cause in making oral comments in the presence and hearing of the jury, in connection with the giving and refusing of the several instructions requested to be given to the jury by the defendant, excepted at the time such comments were made.

23. Because the court erred on the trial of this case in refusing the defendant right to request the jury to find specially upon the following facts, viz:

1. "Was the contract between the Great Western Insurance Company and the defendant the contract alleged by the plaintiff in his petition, or was it the contract alleged in the answer by the defendant.

2. Did the defendant at the time of making the contract know the provisions of the statute laws of Illinois relating to insurance corporations and the liabilities of their stockholders, or did he know them at any time prior to the bankruptcy of the Great Western Insurance Company, and, under all the circumstances surrounding his rela-
276 tions, did he use reasonable diligence to learn what his liabilities were.

3. Were the statements and representations of the Great Western Insurance Company, by and through its authorized agents, made to the defendant at the time he made the contract, believed by the defendant and relied upon by him; and were such statements and representations untrue when made."

24. Because the court erred in its written instructions in giving to the jury, as law applicable to the case, the following:

"I, then (at the commencement of the trial), opened the door to both parties to introduce a large amount of evidence, and I now have become satisfied that a large portion of the evidence should not have been admitted, and is now ruled out, as said statement does not point out what evidence was improperly admitted nor what evidence was ruled out, at the close of the trial, and was therefore calculated to mislead the jury."

25. Because the erred in its written instructions in giving to the jury, as the law applicable to the case, the following portion of said instruction, that is to say, from and including line 6, on page 4, because it is an attempt on the part of the court, while pretending to state the law to the jury, to state the testimony of which the jury was the judge, and which statement was calulated to confuse and mislead the jury.

26. Because the court erred in its written instructions to the jury in its comments upon the second defense of defendant, from and
277 including line 17 on the fourth page to and including 3 on the 5th page, in stating the same incorrectly, which was calculated to confuse and mislead the jury.

27. Because the court erred in its written instructions to the jury when in commenting upon the proofs of the proceeding in bankruptcy, in charging the jury as follows: "I may remark that there is but little attempt at denial," meaning on the part of the defendant.

28. Because the court erred on the trial of this cause in its written instructions to the jury, charging them as follows: "Then the fact of the subscription to the capital stock, to the amount of ten shares and the subsequent possession of ten more shares from Joslin & Park, being admitted, it became a question of fact as to what was the par value of the stock, and this you will find from the pleadings, and when that question shall have been disposed of you are next to find how much has been paid per share. This inquiry will determine the amount still due. Because I now instruct you as a matter of law that you are to disregard all other questions," and which instruction was well calculated to confuse and mislead the jury.

29. Because the court erred on the trial of this cause in its written instruction to the jury, in its argument from and including line 6, on page 7, to and including line 10, and the word subscription in line 11, on page 10, as the same is an argument rather than a statement of the law applicable to the case, and calculated to mislead the jury.

30. Because the court erred on the trial of this cause in its written instruction to the jury, on page 10, in charging as follows:
278 "In some of the States a member of a corporation becomes liable to creditors for all the debts of such corporation, but that extent of liability is not claimed in this case, but only to the amount of his subscription to the capital stock. To this amount I say to you (as a question of law) he is unquestionably liable," which instruction was calculated to mislead the jury, and was erroneous in the terms in which it was given as the extent of the defendant' liability could not possibly be greater than the unpaid balance of his subscription to the capital stock, nor was more claimed in the action.

31. Because the court erred on the trial of this cause in its written instruction to the jury charging them as follows: "Finally I submit to you the only question on which you are to pass upon, all others being withdrawn from you. These questions are as follows:

"1st. Did the defendant subscribe for ten shares of the capital stock of the Great Western Insurance Company?

"2d. Did the defendant become the holder and owner of ten other shares originally subscribed for by Messrs. Joslin and Park?

"3d. Was the par value of that stock one hundred dollars?

"4th. If you shall find from the evidence that he dld so subscribe for the stock, and did become the owner and holder of Joslin and Park's stock, you will find—

"5th. How much has he paid on his first ten shares, and how much has been paid on Joslin & Park's ten shares, and how much remains due and if you find that amount, this will have to be the amount
279 of you' verdict;" which instruction was erroneous and in conflict with other parts of said instructions, and calculated to mislead and confuse the jury.

CORLETT AND McLAUGHLIN,
Att'ys for Def't.

And afterwards, to wit, on the 20th day of March, 1877, the same being one of the regular days of the November, 1876, term of said court the court overruled the motion for a new trial, and rendered judgment for the plaintiff, to which order overruling the motion for a new trial, the defendant, by his attorney, duly excepted at the time said order was made.

And now, on this 14th day of April, 1877, the same being one of the regular days of the November, A. D. 1876, term of said district court, this bill of exceptions is signed and sealed by the judge of said district court, in open court, and it is ordered that this bill of exceptions be made a part of the record in this cause; all of which is accordingly done on the day last aforesaid.

J. W. FISHER, *Judge, &c.* [SEAL.]

Which bill of exceptions is endorsed as follows, to wit: Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Co., vs. Thomas A. Kent. Bill of exceptions. Filed April 14th, 1877. J. W. Bruner, clerk. W. W. Corlett, att'y for def't.

And on the 20th day of March, A. D. 1877, the same being one of the regular days of the November, 1876, term of said court, the
280 court rendered judgment for the plaintiff in this cause in the words and figures following, to wit:

November term, 1876, Tuesday, March 20th, 1877.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company,
vs.
THOMAS A. KENT. } No. 514.

Comes now the said plaintiff, by his attorney, E. P. Johnson, esq. and the defendant being represented by his attorneys, Mess. W. W. Corlett, T. J. Street, and Daniel McLaughlin, and the court having had the defendant's motion for a new trial in this cause, as well as the arguments of counsel thereon under consideration, and being now fully advised in the premises, it is now here ordered by the court that the said motion for a new trial herein be, and is overruled, to which said ruling of the court the defendant, Thomas A. Kent, by his said at-

torneys, then and there excepted. Thereupon the said plaintiff, by his attorney, moved the court for judgment on the verdict herein filed, which said motion is sustained by the court. Whereupon it is now ordered and adjudged by the court that the plaintiff, Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company have and recover of the defendant, Thomas A. Kent, the sum of twelve hundred ($1,200.00) dollars, and the costs of this action, taxed in the sum of $, and that execution issue therefor.

281 And now, on this 14th day of April, A. D, 1877, the same being one of the regular days of the November, A. D. 1876, term of said district court, the court made the following order, in the words and figures following, to wit:

November term, 1876, Saturday, April 14th, 1877.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, *vs.* THOMAS A. KENT. } No. 514.

And now comes the said defendant, by his attorney, W. W. Corlett, esq., and the plaintiff being present by his attorney, E. P. Johnson, esq., thereupon the said defendant, by his said attorney, presents his bill of exceptions, which are now agreed upon by both parties to this suit. Whereupon said bill of exceptions are now allowed by the court signed and sealed by the judge thereof, and ordered to be made a part of the record herein.

TERRITORY OF WYOMING,
County of Laramie, ss:

I, J. W. Bruner, clerk of the district court within and for said county of Laramie, in the Territory aforesaid, do hereby certify that the foregoing pages contain true and correct copies of the petition, answer, demurrer, replication, orders of court, bill of exceptions in full,

282 verdict, journal entries of overruling motion for new trial, judgment and allowance of bill of exceptions in the case entitled Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, vs. Thomas A. Kent, so full and entire, as the same appears of record and on the files of said court in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said district court, at Cheyenne City, this 29th day of September, A. D. 1877.

SEAL FIRST DISTRICT COURT, LARAMIE COUNTY, WYOMING TERRITORY. J. W. BRUNER, *Clerk District Court.*

(Endorsed on the back as follows, to wit:) Supreme court. No. 115. Thos. A. Kent, plaintiff in error, vs. Clark W. Upton, assignee, defendant in error. Transcript of record. Filed November 21st, 1877. J. W. Bruner, clerk supreme court.

And thereafter, to wit, on November 9th, 1878, the same being one of the regular days of the adjourned March term, 1878, of the supreme court of Wyoming Territory, the following entry was entered of record on the journal of said court in the words and figures following, to wit:

Adjourned March term, 1878, Saturday, November 9th, 1878.

283 THOMAS A. KENT, PL'FF IN ERROR, *vs.* CLARK W. UPTON, ASSIGNEE, &C., DEF'T in error. } No. 115.

The court having had the motion of said defendant in error to dismiss the petition of said plaintiff in error under consideration, and being fully advised in the premises, and it now appearing to the court that the record herein is not complete, it is thereupon ordered that the same be remanded back to the district court to correct and complete the same, and thereupon it is ordered this case be and is continued until the next term of this court.

And thereafter, to wit, on February 19th, 1879, there was filed in said supreme court, in the cause aforesaid, an additional transcript, in the words and figures as follows, to wit:

TERRITORY OF WYOMING,
In Supreme Court, ss:

To the honorable J. W. Fisher, judge of the district court within and for the county of Laramie, in the Territory of Wyoming:

Whereas at the suit of Thomas A. Kent, plaintiff in error, suggesting to us that error has intervened in the record and proceedings and in the giving of judgment in a certain action of debt which was lately pending in our said court before you, wherein Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, was plaintiff, and the said Thomas A. Kent was defendant, we heretofore commanded you, if judgment thereof was given, that without delay
284 you send to us under the seal of your court, distinctly and openly, an authenticated transcript of the record and proceedings aforesaid, with all things concerning the same, so that we might have them in our supreme court, within and for the said court, at the court-house in Cheyenne City, in Wyoming Territory. And now, in behalf of said Thomas A. Kent, it is shown to us that though you may have sent to us in our supreme court at the time and place aforesaid an authenticated transcript of the record and pleadings aforesaid in some part thereof, yet other parts of the same, and also other things touching them, still remain before you to be sent; therefore we command you that without delay you send to us under the seal of your court, distinctly and openly, a transcript of the record and proceedings aforesaid, and also of all things touching them which, as is before said, remain before you to be sent, and this writ, so that having the same in our supreme court, at the court-house, forthwith, we may cause to be done thereupon what of right and according to the laws of the land ought to be done.

Witness the Hon. J. W. Fisher, chief justice of said supreme court, and the seal thereof, at Cheyenne City, this 10th day of February, A. D. 1879.

{ SEAL SUPREME COURT WYOMING TERRITORY. } J. W. BRUNER, *Clerk Supreme Court Wyoming Territory.*

(Endorsed:) Thomas A. Kent, plaintiff in error, vs. Clark W. Upton, &c. Writ to correct record.

November term, 1876, Thursday, December 7, 1876.

285 CLARK W. UPTON, AS ASSIGNEE, &C.,
vs.
THOMAS A. KENT. } No. 514.

Comes now the parties in this cause, with their attorneys heretofore mentioned, and thereupon the taking of testimony herein is proceeded with and not concluded with when the hour for adjournment arrived.

November term, 1876, Friday, December 8th, 1876.

CLARK W. UPTON, ASSIGNEE OF GREAT Western Insurance Co.,
vs.
THOMAS A. KENT. } No. 514.

Comes now the parties to this suit, by their attorneys heretofore mentioned, and thereupon the trial of this case and the taking of testimony therein is proceeded with, and the same not being concluded when the hour of adjournment arrived, and thereupon the jury, by consent of parties, *the jury* are again allowed to separate until to-morrow morning.

November term, 1876, Saturday, December 9, 1876.

CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Co.,
vs.
THOMAS A. KENT. } No. 514.

Comes now the parties to this suit, with the attorneys heretofore mentioned, and thereupon the trial of this case and the taking of testimony therein is proceeded with, and the same not being concluded when the hour for adjournment arrived, the jury are cautioned by the court not to converse in regard to this case, and by consent of parties they are allowed to separate until the convening of the court on Monday.

286 November term, 1876, Monday, December 11th, 1876.

CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Co.,
vs.
THOMAS A. KENT. } No. 514.

Comes now the parties to this suit into court with their respective attorneys heretofore mentioned, and thereupon the trial of this case and the taking of testimony therein is proceeded with and closed, after which the argument of counsel is commenced and proceeded with, and the same not being concluded when the hour for adjournment arrived the jury in this are allowed by consent of parties to separate until to-morrow morning.

November term, 1876, Tuesday, December 12th, 1876.

CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Co., *vs.* THOMAS A. KENT. } No. 514.

Comes now the parties to this action, with their respective attorneys heretofore mentioned, and thereupon the argument of counsel herein is proceeded with, and the same not being concluded when the hour of adjournment arrived the jury by consent of parties are again allowed to separate until the convening of court until to-morrow morning.

November term, 1876, Wednesday, December 14th, 1876.

CLARK W. UPTON, ASSIGNEE OF GREAT Western Insurance Co., *vs.* THOMAS A. KENT. } No. 514.

287 Comes now the parties to this action, with their respective attorneys heretofore mentioned, and thereupon the argument of counsel herein was proceeded with and closed, after which the court immediately and before proceeding with other business, charged and instructed the jury in regard to law governing this case, and thereupon the jury retired to deliberate upon their verdict in charge of W. M. Massi and W. H. Conley, as bailiffs, who were then and there sworn to discharge their duties as such as the law provides.

November term, 1876, Wednesday, December 14th, 1876.

CLARK W. UPTON, ASSIGNEE OF GREAT Western Insurance Co., *vs.* THOMAS A. KENT. } No. 514.

Comes now the jury herein into open court in charge of the bailiffs heretofore mentioned, and present their written verdict in this case, which said verdict was in words and figures as follows, to wit: C. W. Upton, assignee in bankruptcy of the Great Western Insurance Co., vs. Thomas A. Kent. We, the jury in the above-entitled cause, find for plaintiff, and assess his damages at twelve hundred ($1,200.00) dollars. Cheyenne, Wyo. Terr'y, Dec. 13th, 1876. A. D. Shakespear, foreman. Which said verdict was duly received, announced, and recorded in the presence of both parties, and thereupon the jury were discharged from further consideration of this case.

November term, 1876, Saturday, December 16th, 1876.

CLARK W. UPTON, ASSIGNEE OF GREAT Western Insurance Co., *vs.* THOMAS A. KENT. } No. 514.

288 On application of W. W. Corlett, esq., of counsel for defendant, it is ordered by the court that the time for filing a motion

for a new trial herein be extended to the end of the present term of this court.

November term, 1876. Monday, February 19th, 1877.

CLARK W. UPTON, ASSIGNEE OF GREAT Wstern Insurance Co., *vs.* THOMAS A. KENT. } No. 514.

Come now the parties in this action, by their respective attorneys, to wit, E. P. Johnson, esq., for plaintiff, and W. W. Corlett and Thomas J. Street, esq'rs., for defendant, and thereupon the motion to set aside the verdict and grant a new trial to defendant herein is now argued by counsel but not concluded when the hour of adjournment arrived.

November term, 1876. Tuesday, February 20th, 1877.

CLARK W. UPTON, ASSIGNEE OF GREAT Western Insurance Co., *vs.* THOMAS A. KENT. } No. 514.

Come now the parties in this action, by their respective attorneys heretofore mentioned, and thereupon the argument of counsel on the motion for a new trial for defendant is proceeded with and concluded, and the same is taken under advisement by the court. On application of counsel for defendant herein it is now ordered that the time for preparing, settling, and filing of bills of exception in this case be, and the same is hereby, extended until the 1st day of the next term of this court.

289 TERRITORY OF WYOMING,
County of Laramie, ss:

I, T. J. Fisher, clerk of the district court within and for said county of Laramie, in the Territory aforesaid, do hereby certify that the foregoing pages contain true and correct copies of the petition, answer, demurrer, replication, orders of court, bill of exceptions in full, verdict, journal entries of overruling motion for new trial, judgment and allowance of bill of exceptions in the case entitled Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, vs. Thomas A. Kent, so full and entire as the same appears of record on the files of said court in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said district court at Cheyenne City this 13th day of February, A. D. 1879.

{ SEAL FIRST DISTRICT COURT LARAMIE COUNTY, WYOMING TERRITORY. } T. F. FISHER, *Clerk District Court.*

(The answer of the judge of the district court within named, a true transcript of the record and proceedings within mentioned, with all things touching the same, is herewith returned at the day and place within mentioned, in a certain record to this writ annexed as within commanded. Attest, T. F. Fisher, clerk dist. court.)

(Endorsed:) Thos. A. Kent, pl'ff in error, vs. Clark W. Upton, assignee, &c. Additional transcript. Filed February 19th, 1879. J. W. Bruner, cl'k sup. court.)

290 And thereafter, to wit, on the 22d day of May, A. D. 1879, the same being one of the regular days of the March term, 1879, of the supreme court of Wyoming Territory, the following judgment was entered of record on the journal of said court in the cause aforesaid, in the words and figures following, to wit:

March term, 1879. Thursday, May 22d, 1879.

THOMAS A. KENT, PLAINTIFF IN ERROR,
vs.
CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, defendant in error. } No. 115.

This cause came on for hearing upon the petition in error, the transcript of the record and the papers and pleadings from the district court of the first judicial district of the Territory of Wyoming, within and for the county of Laramie, and was argued by counsel, on consideration whereof the court find that there is error therein apparent upon the record to the prejudice of the said Thomas A. Kent, plaintiff in error.

It is therefore considered by the court that the judgment aforesaid be reversed and held for naught. And the court further proceeding to render such judgment as the said district court ought to have rendered, find that said court had no jurisdiction of said cause; that the said judgment was rendered in favor of the said Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company of Chicago, Illinois, defendant in error, and against the said Thomas A. Kent, plaintiff in error, when by the law of the land it should have been rendered in favor of the said Thomas A. Kent, plaintiff
291 in error, and against the said Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company of Chicago, Illinois.

It is therefore considered by the court that judgment be rendered herein in favor of the said Thomas A. Kent, plaintiff in error, and against the said Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company of Chicago, Illinois, defendant in error, and that the said plaintiff in error recover from the said Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company of Chicago, Illinois, defendant in error, his costs herein expended taxed at $93.50 *dollars*, to which judgment and opinion of the court Mr. Justice Jacob B. Blair dissents. It is further ordered that this judgment be remanded to the district court of the first judicial district of the Territory of Wyoming, within and for the county of Laramie, for execution, and that a special mandate be sent to said court therefor.

292 And on the same said 22d day of May, A. D. 1879, there was filed in said court in the cause aforesaid the opinion of the court, in the words and figures following, to wit:

TERRITORY OF WYOMING:

Supreme court, March T., 1879.

THOMAS A. KENT
vs.
CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Co.

The opinion of the court was delivered by Mr. Justice Peck.

This is an action brought by Upton as assignee in bankruptcy of the Great Western Insurance Co., against Kent, to recover an alleged balance with interest, on a contract of purchase of the stock of the co. Defense was made, trial had, and verdict and judgment were rendered for the assignee, and Kent appeals. The same question of jurisdiction arises, and in the same way in this case, as in the case of Dan'l McLaughlin against the same assignee, which last-mentioned case has been decided at this term. The opinion in that case applies to this one. The judgment rendered below is reversed and this action is dismissed with costs to the plaintiff in error of the district court and of the appeal.

(Endorsed:) No. 115. Territory of Wyoming supreme court, March T., 1879. Thomas A. Kent vs. Clark W. Upton, assignee in
293 bankruptcy of the Great Western Insurance Co. Opinion of the court, by Mr. Justice Peck, upon the merits. Filed May 22d, 1879. J. W. Bruner, clerk.

And thereafter, to wit, on the 1st day of August, A. D. 1879, the said plaintiff in error filed his citation in the words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Territory of Wyoming, ss:

To Thomas A. Kent, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1879, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Wyoming, wherein Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, is plaintiff, to show cause, if any there be, why the judgment in said writ mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this first day of August, in the year of our Lord one thousand eight hundred and seventy-nine.

J. W. FISHER,
Chief Justice of the Supreme Court of Wyoming Territory.

(Endorsed:) No. 115. Supreme Court of the United States. Clark W. Upton, assignee in bankruptcy of the Great Western Insur-
294 ance Company vs. Thomas A. Kent. Citation. To October term, A. D. 1879.

Service acknowledged at Cheyenne, Wyo. Ter., this 1st day of August, 1879.

W. W. CORLETT,
Attorney for T. A. Kent.

Filed August 1st, 1879. J. W. Bruner, clerk.

And on the same said day aforesaid there was filed in said court an affidavit of value of matter in controversy, in words and figures following, to wit:

Supreme Court of the United States.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Compans, plaintiff in error,
vs.
THOMAS A. KENT, DEFENDANT IN ERROR.

I, Edward P. Johnson, being duly sworn on oath, say I am attorney for the plaintiff in error in this cause in the supreme court of Wyoming Territory; that the matter in dispute in this cause, exclusive of costs, exceeds the sum of one thousand dollars in value.

EDWARD P. JOHNSON.

Sworn to and subscribed before me this 1st day of August, A. D. 1879.

J. W. BRUNER,
Clerk Supreme Court.

(Endorsed:) No. 115. Supreme Court of the United States. Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, vs. Thomas A. Kent. Affidavit of the value of the matter in dispute. Filed August 1st, 1879. J. W. Bruner, clerk.

295 And thereupon, on the same said day, there was filed in said cause a bond for review on writ of error in the words and figures following, to wit:

Supreme Court of the United States.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, plaintiff in error,
vs.
THOMAS A. KENT, DEFENDANT IN ERROR.

Know all men by these presents that we, A. Underwood, Charles W. Riner, and Hartwell S. Tracy, of Cheyenne City, Laramie County, Wyoming Territory, are held and firmly bound unto Thomas A. Kent in the sum of five hundred dollars to be paid to the said Thomas A. Kent, his executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 1st day of August, A. D. 1879.

Whereas the above-named Clark W. Upton, assignee as aforesaid,

hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above cause by the supreme court of Wyoming Territory:

Now, therefore, the condition of this obligation is such that if the above-named Clark W. Upton shall prosecute this writ of error to
296 effect, and answer all costs if he shall fail to make his plea good, then this obligation to be void; otherwise to remain in full force and virtue.

A. UNDERWOOD. [SEAL.]
CHARLES RINER. [SEAL.]
HARTWELL S. TRACY. [SEAL.]

I hereby approve the above bond.

J. W. FISHER,
Chief Justice of the Supreme Court of Wyoming Territory.

(Endorsed on the back as follows:) No. 115. Supreme Court of the United States. Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, vs. Thomas A. Kent. Bond for review on writ of error. Filed August 1st, 1879. J. W. Bruner, clerk.

TERRITORY OF WYOMING, *ss:*

I, J. W. Bruner, clerk supreme court of Wyoming Territory, do hereby certify that the foregoing pages contain a true, full, and correct copy of the petition in error, transcripts, journal, entry of
297 judgment, citation, opinion, affidavit of the value of the matter in dispute, and bond for review on writ of error in the cause aforesaid, so full and entire as the same remains on file and of record in the clerk's office of said supreme court.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this 30th day of August, A. D. 1879.

[L. S.]

J. W. BRUNER,
Clerk Supreme Court Wyoming Territory.

Cost of transcript, $99.50.

TERRITORY OF WYOMING, *ss:*

I, J. W. Fisher, chief justice of the supreme court of Wyoming Territory, do hereby certify that J. W. Bruner, whose name is subscribed to the foregoing certificate, now is and was at the time of signing and sealing the same the clerk of said supreme court and the keeper of the records and seal thereof, and that said clerk was duly appointed
298 and qualified to office, and that full faith and credit are and of right ought to be given to all his official acts as such clerk in all courts of record in the United States and elsewhere; that his said certificate is in due form of law, and that his signature thereto is genuine.

Witness my hand this 30th day of August, A. D. 1879.

J. W. FISHER,
Chief Justice of the Supreme Court of Wyoming Territory.

(Indorsement on cover:) No. 260. Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, plaintiff in error, vs. Thomas A. Kent. Wyoming Ter'ty supreme court. Filed 22 September, 1879.

OFFICE SUPREME COURT U. S.
FILED
FEB 25 1882
JAMES H. MCKENNEY

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1881.

CLARK W. UPTON, Assignee in Bankruptcy of the GREAT WESTERN INSURANCE COMPANY,
Plaintiff in Error,
vs.
THOMAS A. KENT,
Defendant in Error.

Error to the Supreme Court of the Territory of Wyoming.

No. 260.

Brief and Argument for Plaintiff in Error.

HOMER COOK,
For Plaintiff in Error.

CHICAGO, ILL.:
S. I. BRADBURY & SONS, LEGAL PRINTERS, 78 FIFTH AVE.
1881

Supreme Court of the United States,

OCTOBER TERM, A. D. 1881.

CLARK W. UPTON, Assignee in Bankruptcy of the GREAT

NOTE.

The questions involved in this case are identical with those in case No. 261, for which reason this brief is a substantial duplicate of the one in that case.

STATEMENT OF THE CASE.

The plaintiff in error, as the assignee in bankruptcy of the Great Western Insurance Company of Chicago, Illinois, brought this action in the District Court of the First District of the Territory of Wyoming, against the defendant in error, to collect a balance of sixty per cent. alleged to be due upon twenty shares of $100.00 each of the capital stock of said company, together with interest on said balance.

Said company had been chartered by the Legislature

of the State of Illinois in 1857 with a fixed capital of $100,000, but in 1870, acting under the general insurance laws of that State it obtained the right to increase its capital stock to $5,000,000. On the 6th of February, 1871, the defendant in error became the owner of twenty shares of this increased capital stock, upon which there had been paid forty per cent. of the par value. A certificate for said stock was duly issued to him, across the face of which were stamped the words, "*Non-assessable.*"

The company carried on the business of fire insurance in Chicago until the great fire of Oct. 9, 1871, and although rendered insolvent in consequence of the heavy losses sustained by said fire, yet it struggled for a few weeks to continue to do business, but on the 6th of February, 1872, it was duly adjudged a bankrupt by the District Court of the United States for the Northern District of Illinois, upon a petition filed against it for that purpose on the 17th of January, 1872.

The plaintiff in error was appointed assignee in bankruptcy of said company on the 11th day of April, 1872.

On the 5th of July, 1872, the said court, upon due application by the assignee, made an order that the amount unpaid on the capital stock of said company should be paid to the said assignee on or before the 15th day of August, 1872.

The defendant in error having failed to pay the balance due upon his stock, in accordance with the terms of the said order, and being a resident of the Territory of Wyoming, this suit was commenced against him in the said District Court of the First District of said Territory, on the 8th day of April, 1876, by petition, under a code practice in that Territory.

To the petition of the plaintiff in error, the defendant in error answered:

1st. The general issue, substantially.

2d. That when he became the owner of said stock he was a resident of Wyoming, and was not bound to know, and did not know, the laws of the State of Illinois; that at the time he subscribed, the company represented to to him that said twenty shares would be forever non-assessable, and that he would never be called upon or liable for any other sum on account of said stock, except twenty per cent.; that, relying upon and believing that such representations were true, he subscribed, etc.

3d, and lastly. The defense of set-off was interposed. (See pages 7, 8 and 9, printed Record.)

To the defense of set-off the plaintiff demurred and the District Court overruled the demurrer, but on trial ruled out all evidence as to the defense of set-off, and instructed the jury that the set-off or counter-claim interposed, constituted no defense to the action.

In December, 1876, a trial by jury was had, resulting in a verdict and judgment in favor of the plaintiff for $1,200.00, being the balance unpaid without interest. The defendant then sued out a writ of error to the Supreme Court of the Territory, which court in May, 1879, reversed the judgment of the District Court and dismissed the suit, and thereupon the plaintiff in error brings the suit to this court by a writ of error.

From the opinion of said Supreme Court of Wyoming, referred to on page 119 of the printed record, and found in full on pages 63–4–5 and 6 of the record in No. 261 of this term, it will be seen that said court held, that inasmuch as over two years had elapsed since the cause of action had accrued to the plaintiff in error, the suit was barred under the limitation provided by

section 2 of the Bankrupt Act of 1867, now section 5057 of the Rev. Statutes of the United States.

That although this two year's statute of limitation had not been pleaded or in any other manner interposed as a defense by the defendant in error in the District Court, yet as this bar of limitation was jurisdictional, and as the ground of the bar appeared from the record, that it was the duty of the District Court, on inspection of the record, and of its own motion, to have dismissed the suit.

It appeared from the record that this suit was not commenced within two years from the time the cause of action accrued, the plaintiff in error having been appointed as such assignee on the 11th of April, 1872, and the Bankrupt Court having on the 5th of July, 1872, ordered the balance remaining unpaid upon the stock to be paid to the assignee by the 15th of August, 1872, and the suit not having been commenced until the 8th of April, 1876; therefore, whether the date at which the claim accrued to the assignee be treated as the date of his appointment, or the date designated in the order for payment, over two years had inter-

Assignment of Errors.

The plaintiff in error assigns, and relies upon, the following errors in the record of the Supreme Court of Wyoming Territory:

First—The Court erred in reversing the judgment of the District Court of the first district of said territory.

Second—The Court erred in rendering a judgment in favor of the defendant in error against the plaintiff in error for cost, etc.

Third—The Court erred in finding that there was apparent error upon the record of the said District Court, and in finding that said District Court had no jurisdiction of the cause.

ARGUMENT.

The first question which should be determined, is whether this suit falls within that clause of section 2 of the Bankrupt Act of 1867, now section 5057 of the Revised Statutes of the United States, which provides that, no suit, at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person *claiming an adverse interest*, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee.

The defendant in error in this suit cannot be said to claim an adverse interest in any property or rights of property in controversy.

It is a suit to collect a debt, or to enforce the payment of money due from the defendant in error upon a contract, and the defense is simply that he does not owe any such money, that he is not indebted to the plaintiff in error; and while in one sense it is a suit touching a right of property of the bankrupt, yet the defendant in error claimed no adverse interest touching or in respect of the debt claimed in the sense of said section. If this suit is included within the provisions of said section, then clearly all choses in action of every kind existing in favor of the bankrupt's estate, whether for money due the bankrupt or otherwise, would be included. To hold otherwise would be to allow no meaning to the words "claiming an adverse interest."

Said second section of the Bankrupt Act of 1867, is a substantial re-enactment of the eighth section of the Act of 1841, and in determining what the intention of Congress was as to the class of actions which were to be commenced within two years, as provided by said section, much aid can be derived from an examination

of the juidicial construction which had been given to said provision in the said eighth section of the 1841 act.

The two sections are as follows:

Sec. 8, Act of 1841, Vol. 5, U. S. Statutes at Large, p. 446.

"*And be it further enacted*, That the Circuit Court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the District Court of the same district, of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee; *and no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any Court whatsoever unless the same shall be brought within two years* after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued."

Sec. 2, Act of 1867, Vol. 14, U. S. Statutes at Large, p. 518.

And, be it further enacted, That the several Circuit Courts of the United States, within and for the districts, &c. * *

Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee.

But no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid; in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee.

That portion of each of these sections defining the class of actions which must be commenced within two years, is printed above in italics.

Said portions are identical, and inasmuch then as Congress has literally re-enacted said portion of said 8th section of the act of 1841, it becomes of the first importance to ascertain what judicial construction had been given to the same prior to its re-enactment or incorporation into the 2nd section of the act of 1867, for it is to be presumed Congress so re-enacted it in view of such construction and in affirmation thereof.

The earliest decision giving a construction to this limitation clause of said 8th section of the Act of 1841, is by the Supreme Court of Florida, in January, 1847, in the case of *Archer, assignee*, v. *Duvals' administrator*, 1 Fla. p. 219, holding that the limitation applied to all suits.

In delivering its opionion, the Court makes use of the following language, to-wit: "It is contended by the plaintiff that this cause does not apply to or embrace the case of defendants, because there is not in question an adverse interest touching any property or right of property of the bankrupt. The Act declares that 'no suit at law by such *assignee shall in any case* be maintainable *in any court whatever*, unless brought within two years.' If this be the correct reading of the text, the Act is very explicit, and leaves no room for construction." (P. 224, 1 Fla.)

There is no room to doubt the correctness of the decision of the court in that case if its reading of the act is correct, but if that is so, a very unfortunate use of language has been made by Congress to express its meaning, for the courts of no other State have followed and adhered to that construction of this clause.

In the cases of *Comegys* v. *McCord*, 11 Ala. 932, decided in 1847, and of *Harris, assignee*, v. *Collins*, 13 Ala. 388, decided in 1848, the Florida decision was seemingly followed.

Afterwards, and in 1852, the question again came before the Supreme Court of Alabama, in the case of *Paulding* v. *Lee*, et al., 20 Ala. 753.

The court declined to follow its earlier decisions, and, although this question was directly involved and considered by the court, yet three of the five judges preferred to be considered as expressing no opinion upon the construction of said eighth section of the Bankrupt Act of 1841, but concurred with the other two judges in deciding the case upon another point involved. The two judges were in favor of adhering to their former decisions. The question was thus left, and has ever since remained an unsettled one in Alabama.

We fail to find that the court of last resort of any other State except Alabama has ever followed the decision in *Archer, assignee*, v. *Duvals' administrator, supra*. But we do find that soon after the second Alabama case was decided, the Supreme Court of Maine decided exactly the other way in the case of *Carr* v. *Lord*, 29 Maine, 51.

It is there held as appears from the head notes which we quote that:

"By the latter clause of the Eighth Section of the U. S. Bankrupt Law of 1841, declaring that certain actions should not be maintained, 'unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of action shall first have accrued,' is intended, merely, that no suit by or against the assignee, claiming an adverse interest in any property or right of property, transferable to or vested in such assignee, and no suit

by or against any other person claiming an adverse interest in the same, should be maintained, unless brought within the two years. An action upon a note, therefore, given by a person to the bankrupt, before the decree of bankruptcy, is not barred by such limitation of two years."

The next decision in point was by the Supreme Court of the State of Pensylvania, in 1849, in the case of *Union Canal Co.*, v. *Woodside*, 11 Penn. State Rep. 176. It is there held that the limitation in the Eighth Section of the Bankrupt Act of 1841: "That no suit shall in any case be maintainable by or against the assignee or by or against any person claiming an adverse interest, touching the property of the bankrupt, unless brought within two years after the declaration and decree in bankruptcy, or after the cause of action shall first have accrued, is intended to prevent the adverse claims of third persons from impeding the settlement of bankrupts' estate, and extends only to cases where there is such an adverse interest."

The next decision, giving a construction to this clause, was delivered by the late Judge Nelson in 1862, while holding the Circuit Court of the U. S. for the Southern District of New York, being at the time one of the justices of this court. The opinion being short, we give it below almost entire, viz:

"NELSON, J.—It is not important to state the facts relied on in the petition, to maintain it upon the merits, as the only question which has been adjourned to this Court by the District Court for decision is, whether or not the short bar of two years limitation to suits, prescribed in the 8th section of the Bankruptcy Act, [of 1841,] applies to the case. That section provides, that the Circuit Court shall have concurrent jurisdiction with the District Court of all suits at law and in equity, which may and shall be brought by any assignee of the bankrupt, against any person or persons claiming an ad-

verse interest, or by such person against such assignee, touching any property, or rights of property, of said bankrupt, transferable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any Court whatever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.

It is obvious, from a careful perusal of this section, that the limitation applies only to suits growing out of disputes in respect to property and rights of property of the bankrupt which come to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt, and before the assignment. These disputes or claims affect the assets of the bankrupt, and an adjustment of them, either by compromise or suit, is indispensable to a settlement and distribution of the estate among the creditors. A short bar, by limitation, to suits brought either by the assignee or the adverse claimant, furnishes a fit and appropriate remedy against delay, where compromise is impracticable. The last clause of the section seems conclusive in favor of this construction. The time from which the two years' limitation begins to run, is the date of the declaration and decree of bankruptcy, or if the cause of action had not then accrued, two years after it had. The first clause of the limitation could apply only to adverse claims existing before the assignment, and the second applies to the same, but provides for the case where the right to institute the suit did not accrue till after the date of the decree." * * * * * * * * * * "I am of opinion that the limitation in the 8th section of the statute does not apply to the case presented, and shall direct it to be so certified to the District Court."

In re Conant, 5 Blatchford, p. 55.

Following this decision comes one by the Court of Appeals of the State of New York in the case, of *Stevens* v. *Hauser*, 39 N. Y. 302, decided in 1868. On page 309, Bacon, J., says:

"But, in my judgment, the statute in question has no application whatever to a case of this kind. In the words of Judge NELSON, in a case where he was called to interpret the eighth section: 'It is obvious that the limitation only applies to suits growing out of disputes in respect to property and rights of property of the bankrupt, which came to the hands of the assignee, and to which adverse claims existed while in the hands of the bankrupt, and before the assignment. These disputes affected the assets of the bankrupt, and an adjustment of them, either by compromise or suit, was indispensable to a settlement of distribution of the assets among the creditors.' This is a very just construction of the statute, and gives effect and meaning to this provision."

The construction of this limitation clause in said eighth section of the act of 1841 came before this court, it appears, but twice before the passage of the Bankrupt Act of 1867. The first time was in 1854, in the case of *Clark* v. *Clark et al.*, 17 Howard, 315.

That suit related to a certain fund which had been paid into the United States Treasury upon an award. The Court held that the limitation act did not apply, for the reason that the suit was between the assignee and the bankrupt, and also *because the fund had never been held adversely*. (See 17 How., p. 322.)

Again, in 1862, in the case of *Banks* v. *Ogden*, 2 Wallace, 57, this court held that the act in question did not apply until two years after *adverse* possession. In that case on page 69, 2 Wall., this Court says:

"The eight section of the Bankrupt Act of 1841 limited suits concerning the estate of the bankrupt by assignees against persons claiming adversely, and by such person against assignees, to two years after decree of bankruptcy or first accrual of cause of suit."

In each of these cases importance seems to have been attached to the question, as to whether or not there was

any *claiming* or *holding* the subject matter of the suit *adversely*. If there was then the limitation applied, otherwise not. While the question as to whether the limitation applied to suits by the assignee for the collection of debts, was not as directly passed upon as in the decisions of Judge Nelson, and of the State courts cited; yet there is no conflict, and the fact that there is a restriction as to the class of suits, the commencement of which is limited to two years, is very distinctly recognized in said decisions of this court.

These are believed to be all the decisions which have been reported giving a construction to this limitation provision of the bankrupt act of 1841, except *Kane* v. *Pilcher*, 7 B. Monroe, 651, and *Judson* v. *Lathrop*, 6 La. Annual Rep. 587, neither of which are of any importance. The former decides that the limitation provision does not include an application to the chancelor for a rule for the refunding of money, and the latter that it does not apply to cases where one has become the purchaser at the sale of the bankrupts effects of debts due by third persons.

The case of *Clark* v. *Hackett*, 1 Clifford C. C. Reports, simply decided that a bill filed more than two years after the cause of action accrued could not be regarded as an amendment to a former bill filed before the expiration of said two years, but dismissed by the court. The matter in controversy was the same fund which was in litigation in the case of *Clark* v. *Clark et al.*, *supra*.

From an examination of these decisions, it will be seen just what construction the courts had given to this provision of the 1841 act at the time it was re-enacted in 1867.

It will be found that from and after 1848, there had

not been the slightest conflict between the reported decision of any of our courts upon this point. That this two years limitation for commencing suits by or against an assignee did not apply to actions for the collection of debts was uniformly held during this time and therefore thoroughly settled.

These decisions have not only the weight to which they are entitled as authority, but in addition thereto is the presumption that Congress approved and sanctioned them, and it would seem that in construing the act of 1867, courts should now regard these decisions construing this re-enacted act as of the same effect as if such construction had been silently incorporated into the act of 1867. See

Rennock et al. v. *Dialogue*, 2 Peters, 1.

Independent of the fact that this 2nd section of the 1867 act had received a settled judicial construction prior to its re-enactment, it would clearly seem that the only rational construction that can be given to it is that the class of suits to which said section applies is restricted not only as to the parties suing and being sued, but also as to the subject matter in controversy. It must be "a suit between the assignee and a person *claiming an adverse interest, etc.*," and not only that, but it must also be a suit "*touching property or rights of property transferable to or vested in the assignee.*"

If words have any meaning at all, how can it be otherwise than that there are two distinct particulars in which this class of suits are limited.

Precisely the same limitation or restriction exists as to the class of suits wherein Circuit Courts are given concurrent jurisdiction with District Courts by Section 4979, Rev. Stat. U. S., which reads as follows:

"SEC. 4979. The several Circuit Courts shall have within each district concurrent jurisdiction with the District Court, whether the powers and jurisdiction of a Circuit Court have been conferred on such District Court or not, of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights [of property] of the bankrupt transferable to or vested in such assignee."

This Section 4979 is a portion or original Section 2 of the Bankrupt Act of 1867, quoted *ante* in one of the parallel columns. The words "of property," shown above in brackets, were in said Sec. 2, but have been omitted in the Revised Statutes.

Inasmuch, therefore, as said Sections 4979 and 5057 are limited in their application to the same class of actions, a judicial construction given to one may aid in construing the other.

In the case of *Morgan* v. *Thornhill*, 11 Wall. 65, it became necessary to examine and construe this second section of the act 1867, with reference to the jurisdiction of Circuit Courts. It will be seen that, after having considered the first and second provisions of said section, Mr. Justice Clifford, in delivering the opinion, says on page 75, 11 Wall.:

"Apart from those two provisions the third clause of the section provides that circuit courts *shall also have* concurrent jurisdiction with the district courts of *all suits at law or in equity* which may or shall be brought by *the assignee* in bankruptcy against any person claiming *an adverse interest*, or by *such person* against *such assignee* touching any property or rights of property of such bankrupt transferable to or vested in such assignee.

Controversies, in order that they may be cognizable under that clause of the section, either in the circuit or district court, must have respect to some property or rights of property of the bankrupt transferable to or

vested in such assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause and against the other. All three of those conditions must concur to give the jurisdiction, but where they all concur the party suing may, at his election, commence his suit either in the circuit or district court."

The words italicised in the above quotations are printed in like manner in the report.

And on the following page the Court says:

"Such a suit, however, by or against such assignee, or by or against any person claiming an adverse interest in any such property or rights of property, cannot be maintained in any court whatsoever unless the same shall be brought within two years from the time the cause of action, for or against such assignee, accrued."

A question involving the construction of said Section 4979 came up before this Honorable Court in the case of *Burbank et al.* v. *Bigelow*, 92 U. S. Rep. 179. With reference to the class of actions to which this section applies, Mr. Justice BRADLEY, page 182, says:

"A right of property is controverted. The complainant contends that the fruits of the judgment recovered by Bigelow, the bankrupt, against Edward W. Burbank, belong to the firm of which her husband was a partner. The bankrupt and his assignees deny this. It is a controversy, the determination of which is clearly embraced within the jurisdiction conferred upon the Circuit Court by the second clause of Section 2 of the original Bankrupt Act, now Sec. 4979 of the Revised Statutes."

It seems to have been assumed in deciding this case that there might be cases, concurrent jurisdiction of which, was not conferred by said section, otherwise why was it necessary to determine whether the controversy in that case was embraced within the jurisdiction thus conferred?

Various judges of Federal courts have decided that

this section 4979 did not confer concurrent jurisdiction upon circuit courts to entertain suits for the collection of debts. See

Goodell v. *Tuttle*, 7 B. R. 193.
Buchanan v. *Packard*, 7 B. R. 353.

Congress, by act of 22d June, 1874, amended this section by extending the jurisdiction of circuit courts to suits, by an assignee against persons "owing any debt to such bankrupt," but did not amend said section 5057 in the same particular. So that after said amendment the class of suits, of which the circuit courts had concurrent jurisdiction with district courts, was more comprehensive than the class, the commencement of which was limited to two years by section 5057.

The decisions of the various federal courts in construing this two years' limitation clause have not been uniform since the passage of the Bankrupt Act of 1867. By many courts it has been held that the limitation does not apply to suits for the collection of ordinary debts due the bankrupt prior to the adjudication. See

Smith v. *Crawford*, 7 N. B. R. 38.
Sedgwick v. *Casey*, 4 N. B. R. 496.
Woods v. *Forsyth*, 5 N. B. R. 78.
In re Krogan, 5 N. B. R. 116.
Davis v. *Anderson*, 6 N. B. R. 145–158.
Goodall v. *Tuttle*, 7 N. B. R. 193–196.
Backman v. *Packard*, 7 N. B. R. 353.
Lotting v. *Fossman, et al.*, 17 B. B. R. 183.

It has on the other hand, however, been held that this two years statute of limitations in the Bankrupt Act (sec. 5057) does apply to an action by an assignee to enforce against stockholders the payment of their unpaid shares.

Poyson, assignee, v. *Coffirn*, 5 Dillon, 473.
Fooeman, assignee, v. *Bigelow*, 18 N.B.R. 457.
Scoville v. *Shaw*, 4 Cliff. 547.

In these cases, *Bailey* v. *Glover*, 21 Wallace, 315, seems to be relied upon as an authority for holding that the limitation applies to suits of that character, but it would clearly seem that the decision in that case has been misapprehended entirely.

It was a bill in chancery filed by an assignee to set aside a conveyance of real estate made over three years before the filing of the bill on the ground of fraud, a demurrer to the bill had been sustained in the court below on the ground that the two years limitation was a bar to the suit.

On appeal this court held that there being an adverse claim the statute applied to that class of suits, yet, inasmuch as the bill alleged the existence of the fraud had been concealed from the knowledge of the assignee until within two years before the time the bill was filed, the bar of the statute did not commence to run until the fraud was discovered or become known to the party injured by it, and that the demurrer should not have been sustained.

In considering the case the Court deemed it important to determine whether any *claim had been asserted adverse* to the assignee, and found that there had been, as will be seen from the opinion delivered by Mr. Justice Miller, a portion of which is given below, italics being used only where the Court has used them, viz:

"Counsel for the appellant argues that the provision of second section of the Bankrupt Act has no application to the present case, because it is not shown that the defendants have set up or *asserted any claim* to the property now sought to be recovered *adverse* to that of the assignee. It is rather difficult to see exactly what is meant by this proposition. The suit is brought to be relieved from some supposed claim of right or interest in the property on the part of the defendants. If no such claim exists, it does not stand in the way of complainant, and he does not need the aid of a court of

equity to set it aside. If it is intended to argue that until some one asserts in words that he claims a right to property transferred to the assignee by virtue of the act, which is adverse to the bankrupt, the statute does not begin to run, though such person is in possession of the property, acting as owner, and admitting no other title to it. We think the construction of the proviso entirely too narrow."

"This is a statute of limitation. It is precisely like other statutes of limitation, and applies to all judicial contests between the assignee and other persons touching the property or rights of property of the bankrupt transferable to or vested in the assignee, where the interests are adverse and have so existed for more than two years from the time when the cause of action accrued, for or against the assignee." Such is almost the language in which the provision is expressed in section 5057 of the Revised Statutes.

Baily v. *Glover*, 21 Wallace, p. 346.

It is not easy to see how this decision can be considered authority for holding that the limitation applies to suits for the collection of debts.

What the Court said afterwards in its opinion relative to one of the purposes of the bankrupt law that there should be a speedy disposition of the bankrupt's assets, was general in its nature, and was not intended evidently to give any construction to this limitation clause of the statute, or at least any different construction from that it had already stated.

It is not unreasonable to conclude that Congress did not intend to limit the time for the collection of debts due to bankrupts. It provided by Sec. 5064 Rev. Stat., that the assignee might sell bad debts belonging to the bankrupt's assets, which could not be collected by him without unreasonable delay, and why should their salable value be impaired by imposing this short limitation of time within which to collect the same. It has been held,

that the limitation includes suits by the purchasers of choses in action from the assignees, if it applies at all.

Again, this statute of limitation, like any other, requires to be pleaded by the defendant, otherwise no advantage can be taken of it.

In this case it was not pleaded, nor in any manner interposed or raised in the District Court, and could not therefore be raised or considered for the first time in the Supreme Court of the Territory.

That the statute must be pleaded, even when the cause of action appears on the face of the declaration, to be out of time. See

Angell, on Limitations, Sec. 285.

Therefore, whatever may be the true construction of this statute, it is now too late for the defendant in error to receive the benefit of its provisions.

It was claimed that the District Court erred in ruling against the defense of set-off, interposed by the defendant in error.

On that point this Court held, that:

A stockholder indebted to an insolvent corporation for unpaid shares, cannot set-off against this trust-fund for creditors a debt due him by the corporation. The fund arising from such unpaid shares must be equally divided among all the creditors.

Sawyer v. *Hoag*, *assignee*, 17 Wall. 610.

It was also contended that said District Court erred in its rulings as to the plea that defendant was fraudulently induced to subscribe for the stock.

On this point, see

Upton v. *Tribilcock*, 91 U. S. 45.

Respectfully submitted,

HOMER COOK.

SUPREME COURT U.S.
FILED
MAR 22 1882
JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the United States.

No. 260.

CLARK W. UPTON, assignee in Bankruptcy of THE GREAT WESTERN INSURANCE COMPANY,
Plaintiff in Error,

vs.

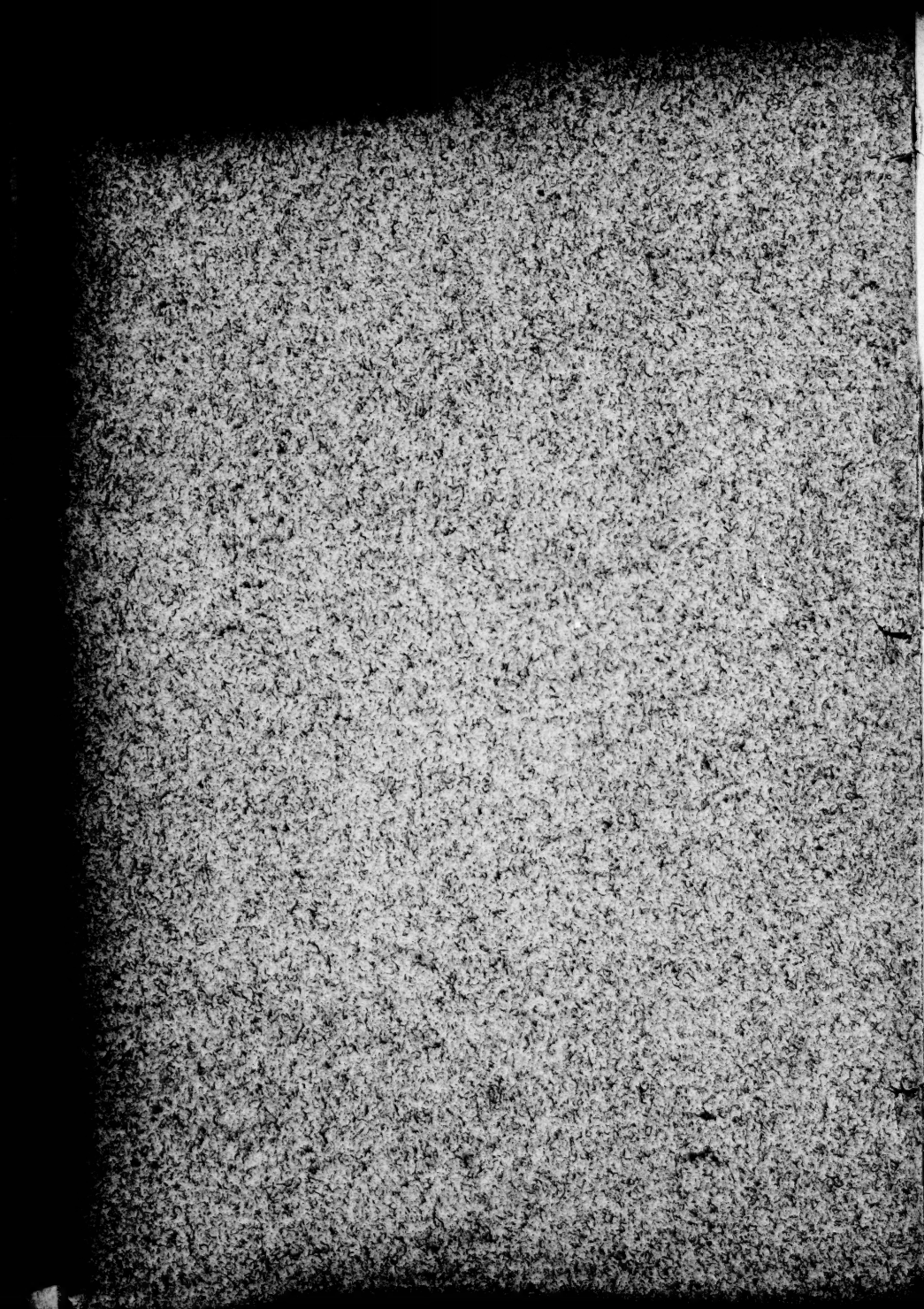
THOMAS A. KENT.

In Error to the Supreme Court of Wyoming Territory.

BRIEF FOR DEFENDANT IN ERROR,

By SHELLABARGER & WILSON.

Thomas McGill & Co., Law Printers, Washington, D. C.



Supreme Court of the United States.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY OF THE GREAT WESTERN INSURANCE CO. PLAINTIFF IN ERROR,

vs.

THOMAS A. KENT.

No. 260.

BRIEF FOR THE DEFENDANT.

But one assignment of error is made by plaintiff. But one point is considered and relied on in his brief, to wit, whether the plaintiff's action is defeated by the two years' limitation of sec. 5057 of Revised Statutes. Hence we shall not discuss, in this argument, any other matters relied on by defendant in the court below, than said single question on which the case was decided below.

WHAT ACTIONS TWO YEARS' LIMITATION APPLIES TO.

The contention on behalf of plaintiff in error, as embodied in the opposing brief, is that this action by an assignee in bankruptcy, for the recovery of an unpaid balance, alleged to be due upon a subscription to the stock of an insurance company, is not a "suit either at law or in equity between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights

of property vested in the assignee," and that, therefore, this action is not one coming within the two years' limitation of section 5057, R. S.

The claim of plaintiff in error is that a suit for this unpaid balance alleged to be due to the bankrupt, "cannot be said to be a suit claiming any *adverse interest* in any property or right of property in controversy."

We condense here a statement of the following decisions bearing upon this contention of the opposing argument:

Walker, assignee, v. *Towner,* 4 Dill., 165, was a suit for an alleged balance due upon subscription of stock by the defendant to North Missouri Insurance Company.

In that case a petition was filed by the assignee of the Insurance Company on 2d of March, 1876—summons issued 1st November, 1876—served 2d November, 1876. Petition avers Insurance Company adjudged a bankrupt 8th November, 1873—that plaintiff, assignee, was appointed March 21, 1874—that 3d July, 1874, the District Court decided, on petition of assignee, that collection of bankrupt assets, including said unpaid stock, was necessary in order to pay debts, and ordered assignee to *proceed forthwith* to collect said unpaid stock subscription.

The second and third special defenses set up said two years' statute of limitation.

These pleas were demurred to, and after hearing Judge Dillon overruled the demurrer.

Amongst other things in the opinion, Judge Dillon says: (167.)

"Since this case was submitted, the same question came before Justice Miller in the Kansas Circuit at June term, 1877, in case of Payson, assignee, *v.* Coffin.

"The learned Justice, after argument and consideration, there held that the two years' limitation in the bankrupt act applied to suits by assignee to collect debts and assets of the estate, as well as suits relating to specific property. The opinion was orally pronounced; but this conclusion was reached as the almost necessary result of the language

of sec. 2 of bankrupt act of 1867; particularly the words 'but *no suit*, at law or in equity, shall in *any case* be maintainable, by or against such assignee,' * * * * * unless the same be brought within two years from the time the cause of action accrued for or against such assignee, which was not intended to be changed in substance by the Rev. Stats., secs. 4979, 5057; and this conclusion was considered to be strongly supported by the views of the Supreme Court, (Lathrop *v.* Drake, 1 Otto, 556: Claflin *v.* Houseman, 3 Id., 130; Bailey *v.* Glover, 21 Wall., 342,) and by the obvious policy of the bankrupt act, in requiring speedy settlement of estates in bankruptcy."

Judge Dillon, after remarking that some of the cases might lead to a different conclusion (citing amongst others 11 Pa. St., 176; 5 Blatchf., 54), adds these words: "But the weight of judicial opinion is with the judgment of Justice Miller, in Payton, assignee, *v.* Coffin.

In *Mitchill* v. *Manufacturing Company*, 2 Story 648–660, Story delivered the opinion; and held that "there cannot be a doubt that a debt claimed by and due to the bankrupt from any person is 'a right of property' in the bankrupt;" * * * "and the debtor in such case is necessarily, in the sense of the act, *an adverse party*," within the sense of these words in sec. 8 of act of 1841 cited on 6 p. of plaintiffs brief.

In *Pitchard, assignee*, v. *Chandler*, 2 Curtis, 488, the suit was on a note to the bankrupt, and Judge Curtis held that this suit would be barred by the two years' limitation of the 8th sec. of act of 1841, unless it appeared that the maker of the note and also the bankrupt fraudulently concealed the cause of action from the assignee.

Judge Curtis fully approved the decision in Mitchell *v.* Great Works, 2 Story, 648.

In Miltenburger *v.* Philips, 2 Wood, 115, suit was brought by the assignees of the Bank of Louisiana for the recovery of money paid by the bank as counsel fees without authority.

The defendant, Philips, excepted peremptorily to the assignee's petition, because, amongst other things, the action was barred by the two years' limitation of section 5057. The petition showed that the money sued for was paid Philips before assignee was appointed, and that the assignee was appointed more than two years before the suit was brought.

The court held the suit barred; and cite as establishing this the cases of Bailey *v.* Glover, 21 Wall., 342; Norton *v.* De la Villebeauve, 1 Wood, 163.

In the case of *Paulding* v. *Lee*, 21 Ala., 753, the same thing was decided as to the two years' limitation provided for in 8th section of act of 1841, being applicable to suits on choses in action, and that the two years' limitation is not confined to suits for recovery of personal property in which defendant sets up an adverse interest.

In Comegys *v.* McCord, 11 Ala., 932, the same doctrine was asserted under section 8 of the act of 1841.

In *Harris* v. *Collins*, 13 Ala., 388, the action was in debt for money due on a lease; and, on demurrer to the petition, showing the elapse of the two years, the court held the action barred under section 8 of act of 1841—the court reaffirming Comegys *v.* McCord, 11 Ala., 932.

Pike v. *Lowell*, 32 Me., 245, was assumpsit for use of assignee or bankrupt, and the court held that 8th section of act of 1841 barred the action.

Archer, assignee of Francis, *v.* Brown, 1 Florida, was an action of debt on a judgment in favor of the bankrupt, Francis, against the defendant Brown; and, amongst other things, defendant claimed, just as in this case, that 8th section of act of 1841 had no application to such a case, because it was not against persons "claiming an adverse interest," &c.

The court held the claim barred by the two-year statute.

In *Payson, assignee of Public Life Insurance Company*, v. *Coffin*, 5 Dill., 473, the action was for unpaid balance on

stock subscribed to an insurance company, made insolvent, as in this case, by the Chicago fire.

Judge Dillon says:

"The two years' limitation in the bankrupt act is applicable to actions like the present. (Walker *v.* Town, 4 Dill., 165; Scovill *v.* Shaw, circuit court, District of Massachusetts, October, 1878, before Clifford & Lowell.) The assumpsit on which this action was brought was made nearly four years after the adjudication of bankruptcy and the execution of the deed of assignment. The only question is when the statute begins to run," &c.

Scovill v. *Shaw*, 4 Cliff., 549, is the case cited by Dillon, J., in the last cited case, and was tried before Clifford and Lowell—the opinion being by Clifford.

There the suit was by the assignee in bankruptcy of "Fort Scott Coal Mining Company" *v.* Executors of Samuel Hooper, deceased; and was for recovery of an assessment of $76 per share on stock held by Mr. Hooper, less the amount he had paid in. This assessment was, on 10th June, 1876, ordered by bankrupt court; which also ordered assignees to sue in default of payment.

The stock was all issued as "*full paid.*" The case was elaborately argued, and the authorities fully cited to the point that the two year limitation did not apply to this action against executors. See pp. 550 to 565, inclusive.

The precise point made in the present case was there strenuously pressed by counsel, that section 5057 has no application to actions to recover mere *money claims.* See page 554, &c.

But the court overruled this view of the case—held the section 5057 to be applicable to that action, and held the action to be barred.

On page 567 Judge Clifford says it was not necessary to decide certain questions raised, "for the reasons given in Foreman *v.* Bigelow, *ante*, 309, [should be 508,] that the claim is barred by the statute of limitations. Authority

referred to in that (Foreman *v.* Bigelow) case will not, with one or two exceptions, be reproduced, nor will the reasons there given in support of the conclusion be repeated. Suffice it to say that it is *now settled* that the statute of limitations is as applicable in the national as in the State courts; (Brown *v.* Hialls, 15 Wall., 183; Ross *v.* Jones, 22 Wall., 576;) and that the section of the bankrupt act referred to applies to ALL JUDICIAL CONTROVERSIES BETWEEN THE ASSIGNEE AND ANY PERSON WHOSE INTEREST IS ADVERSE TO HIS, IN BEHALF OF THE BANKRUPT'S ESTATE, INCLUDING ACTIONS LIKE THE ONE NOW BEFORE THE COURT. Bailey *v.* Glover, 21 Wall., 342; Walker *v.* Towner, 16 Bankrupt Reg., 287."

If Judges Clifford and Lowell, then, were not mistaken, the law is now "settled" that the two years' bar applies to "*every* judicial controversy between the assignee and *any* person whose interest is adverse to his, in behalf of the bankrupt's estate, including cases like the one now before the court."

The one before the court was, in every material respect, identical with the one now under consideration.

Payson, assignee, v. *Coffin,* 4 Dill., 386, was a case precisely like the present, so far as relates to the question of limitation.

Payson, assignee of the Republic Insurance Company, brought suit for the second assessment upon unpaid subscription of stock to the bankrupt company; and the defense was set up by plea that the cause of action did not accrue within two years.

The plea was demurred to. Justice Miller decided the case, after full argument, and held that "the two years' limitation provision in the bankrupt act applies to suits by the assignees to collect debts and assets of the estate, as well as to suits relating to specific property."

Gilford v. *Helms,* 8 Otto, 248, is a case where the assignee of a bankrupt attempted to transfer to third persons,

more than two years after his right to the property had accrued, certain of the bankrupt's assets. This court held that after said bar of two years was completed, the assignee had no power to so assign; and that, in that case, the bar was completed when the assignee attempted to asssign to the complainant, and on this ground reversed the judgment of the court below.

Clifford, J., in deciding that case, used the same broad and unqualified language used by him in Scovill *v.* Shaw, 4 Cliff., 549.

He said (p. 252, 9 Otto): "Beyond doubt it" (the two-year limitation) "applies to *all* judicial contests between the assignee and other persons touching the property, or *right of property*, of the bankrupt, transferable to or vested in the assignee, where the interests are adverse, and have so existed for more than two years from the time when the cause of action accrued for or against the assignee. Bailey *v.* Glover, 21 Wall., 346."

A chose in action is "a right of, or to, property" in the bankrupt, and the assignee's representative interest in such chose is "adverse" to the person owing the debt, as was explained in the above cited case of Scovill *v.* Shaw.

Here, then, *this* court has at least sanctioned the exact doctrine we have here maintained.

The following cases assume that the two years' limitation applies to actions of assumpsit and other like remedies for money merely.

Tappan, assignee, *v.* Whittemore, 15 Blatch., 440.
Geisreiter *v.* Sevier, 33 Ark., 522.
Hyde *v.* Ely, 8 Pac. L. R., 147.

Two Years' Limitation is Available to Defendant.

Plaintiff's second claim is, that as, in the court below, the defendant did not plead the two-year limitation, it is not now available to him.

There are, we think, several replies to this. We shall attempt to add nothing to the argument of the court below in support of its holding that this clause of section 5057 which says "no suit, either at law or in equity, shall be *maintainable* in any court" * * * "unless brought within two years from the time when the cause of action accrued for or against such assignee," is one going to the jurisdiction of the court; and that hence when the fact of the bar affirmatively appears of record, the court must, of its own motion, reject the jurisdiction.

That argument of the court is found at pages 63–69 of the record in case, on this docket, No. 261; and was in case 260 adopted as the court's opinion in the present case. (See R. 119.)

On the branch of the case relating to the point whether the limitation bar can be here considered, it may be well to call to mind some preliminary points.

One is, that there is and can be no dispute about the fact that the petition of the assignee, in the court below, showed just what is declared on the 4th page of plaintiff's brief—that the suit was not begun within two years from the time the cause of action accrued, whether that be the date of assignee's appointment and of the assignment on 11th April, 1872, (R. 12)—and which is the true time of the accruing of the right of action (Foreman *v.* Bigelow, *supra*)—or the 15th of August, 1872, the date when the payment fell due as per order of court. (R. 12.) Suit was begun 8th April, 1876. (R. 13.) This was three days less than four years after the cause of action accrued.

Another preliminary statement is, that in this case the affirmative and unimpeachable facts disclosed by the record, and against which the plaintiff cannot plead or aver, fasten this two years' bar upon the plaintiff's case.

This two years' limitation has annexed to it no exceptions, provisions, saving clauses, or other conditions which defeat the bar—such as infancy, coverture, beyond the seas,

or the like. True, this court has held that where the very object or remedy sought is relief against fraud, there the statute does not "commence to run; the right of action does not potentially accrue" (21 Wall., 347) until the fraud is discovered by the injured party.

But here the petition shows not only that the action is not one to redress injury resulting from fraud, but is one founded upon the written, the record, and the statutory obligations of the company's stockholders; and hence all the facts creating the alleged obligations of defendant, are facts the knowledge of which the law *attributes* to the officers of the company and to their successor, the assignee. (Wainships *v.* Bank, 5 Pet., 529.) In other words, the plaintiff's whole case as based on the laws of Illinois and on the records of the corporation, and the 5057th section of the bankrupt law is shown to be *non-maintainable*.

Still another point to be here premised is that this defect of the petition—to wit, that it discloses the fact that the cause of action is barred—is one that is reached by demurrer. It was so raised, as to this two years' bar, in Phelps *v.* McDonald, 9 Otto, 300, and was treated in that case as being properly raised, and was by this court decided. (p. 306.)

The same thing has been often expressly held by this court.

Rhode Island *v.* Massachusetts, 15 Pet., 233.
Maxwell *v.* Kennedy, 8 How., 210.
National Bank *v.* Carpenter, 11 Otto, 567.

With these facts in mind, we think the following conclusions regarding this contention of the defendant, that the statute of limitations is not here available, are certainly reached:

First, that granting that this limitation clause is *not* one going to the court's jurisdiction, then still it was and is raised by the demurrer of plaintiff (R. 16 and 17) to the sec-

ond defense in the defendant's answer. Says this court in United States *v.* Linn, 1 How., 113:

"It is a *settled* rule that when the demurrer is to the plea, the court, having the whole record before them, will go back to the first error, and when the demurrer is by the plaintiff, his own pleadings must be scrutinized, and the court *will notice* all exceptions to the declaration that *might* have been taken on general demurrer. We are accordingly thrown back on the record to examine the sufficiency of the declaration in the second and third counts."

This court has applied this familiar rule in every variety of cases; but always applied it when the defect of the pleading was one of substance and not one of mere form. (See 7 Howard, 706–722; 4 Cr., 341; 5 Cr., 257–261; cases cited 7 Wall., 93. See also 1 Gall., 87; 2 Pa., 432; 2 McLean, 405; 2 Bond, 13.)

It will be seen that in applying the rule it is wholly immaterial that the pleading of the defendant, demurred to by the plaintiff, may be a special plea or answer, as in the present case. Such demurrer carries the court back to the beginning of the record.

In view of these facts it seems plain that the demurrer of the plaintiff presented to the court below the question of the two-year bar as disclosed by the plaintiff's petition—and this without regard to the question whether this defect went to the court's jurisdiction.

Again, this question of the two years' bar was raised in the court of first trial by the defendant's objection to the introduction of the deed of assignment to Upton, on the ground that it showed on its face, read in view of section 5057, that no action for the matter set up in petition was maintainable by Upton. (R. 60, also assignment 9, R. 2.) The defendant below insisted on this and other objections, as in the nature of a demurrer *ore tenus*, to the plaintiff's petition. (7 Neb. R., 315.)

Even if Limitation not Raised, yet no Ground for Reversal.

If in all the foregoing the defendant is mistaken, and it be true that there is no defect of jurisdiction, and the demurrer did not reach the petition and no exceptions below were effective in presenting the two years' limitation, then, still, we submit the court will not reverse the judgment; because the entire record makes it plain that the plaintiff has, and *can* have, no right of recovery, and hence this court will not reverse, because he is not injured by the error which intervened.

Should this court reverse the judgment and order a new trial, it will be done when this court is by the record made to conclusively know that it will be impossible for the plaintiff, in the new trial, either by amendment of pleading or new proofs, to escape from either of the above named facts creating the bar, to wit:

1. That he was made assignee 11th April, 1872.
2. That the assignment to him was on the same day.
3. That the alleged right of action is one arising out of an alleged contract or subscription of stock, where the money sued for, if due at all, was due about four years before the action was brought.
4. That the full knowledge of existence of said obligation, if it did exist, is by the law attributed to said corporation officers and to plaintiff.
5. That no concealment of fraud, infancy, coverture, absence, or other thing can, from the very nature of this case, as disclosed by the written documents and records of the corporation appearing in record—under the law, exist which can be made available in a new trial for the purposes of escaping the two-year bar, which the record discloses.

It is a matter of every-day action in this and all other

courts of error to refuse to reverse the lower courts when the record, taken as a whole, shows that, whatever error may have intervened, it was harmless; and that the judgment reached is the one which must ultimately be rendered in the case.

SHELLABARGER & WILSON,
Att'ys for Defendant in Error.

15-647

BURGOYNE (Telephone No. 587), 29 Rose St

B

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PETITION FOR A WRIT OF HABEAS CORPUS.

The petition of Robert Boyd respectfully represents that he is a citizen of the United States residing in the City and State of New York, and that he is illegally deprived of his liberty by Henry E. Knox, Esquire, Marshal of the United States for the Southern District of New York, and is held in custody by said Marshal in that district by color of the authority of the United States contrary to the Constitution and Laws of the United States in this, to wit: That prior to the judgment hereinafter referred to, in the Circuit Court of the United States for the Southern District of New York, the United States of America obtained judgment against your petitioner in an action at law for damages amounting to $8,000 and upwards, upon a bond executed to the United States by your petitioner as surety for the performance of certain conditions by the principal in said bond as a distiller. That excution at law upon said judgment has been issued and returned unsatisfied. That thereupon said Circuit Court issued in said action at law on the 19th day of May, 1879, an order which was served upon your petitioner, of which a copy is hereto annexed and marked exhibit A, and known as "an order for the examination of a judgment debtor in proceedings supplementary to execution." That thereupon your petitioner, by counsel, moved the said Circuit Court in said action at law to vacate said order as an illegal exercise of jurisdiction by said Circuit Court, being in substance and effect a proceeding in equity, in the nature of a creditor's bill for discovery, in an action at law, and your petitioner then and there, by his counsel, respectfully

contended and represented to said Circuit Court in said action that it had no jurisdiction of the person of your petitioner or of the subject matter of said order, by virtue of said order or its service. Said Circuit Court denied said motion.

Thereafter your petitioner was ordered and required to submit to examination under said order, and, without any disrespect of or contempt for said Court, your petitioner refused to take an oath to testify under said order, whereupon, upon the motion of the attorney for the United States, plaintiffs in said action, the said Circuit Court, on the day of April, 1882, ordered that your petitioner be attached and committed to the custody of said Henry E. Knox, Esquire, Marshal as aforesaid, who now holds your petitioner and restrains him of his liberty accordingly, as punishment for a contempt of said Court in refusing to be sworn as aforesaid. That your petitioner is not in custody by virtue of any other process or proceedings. Your petitioner is informed and believes that proceedings supplementary to execution, wherein your petitioner is restrained of his liberty, are not, by the laws of the State of New York, a remedy in common law causes to reach the property of the judgment debtor allowed in actions at law in the courts of the United States by § 916 of the Revised Statutes of the United States; but, on the contrary, that these proceedings are, by the laws of the State of New York, prescribed as part of a code to abolish common law causes, as such, and to amalgamate and indiscriminate common law causes and suits in equity, and to confer upon the courts of that State, indifferently, in the same action powers in actions at law and in equity. Your petitioner is informed and believes that the application of this provision of that code to the Courts of the United States is not authorized by any act of Congress, and is in conflict with the provisions of Article III., § 2, of the Constitution of the United States, which preserves and establishes the distinction between relief at law and in equity.

Your petitioner, therefore, avers and charges that the said Circuit Court was and is wholly without jurisdiction in the premises, and that, therefore, all its proceedings therein are null and void.

Wherefore, your petitioner prays that this Honorable Court do forthwith order the writ of habeas corpus to issue from this Court to the said Henry E. Knox, requring him to produce the body of your petitioner before this Court, at some time to be designated in said writ, there to abide what shall be awarded by this Court in the premises.

And he further prays that this Court will direct the writ of *certiorari* to issue from this Court to the said Circuit Court of the United States for the Southern District of New York, ordering and requiring said Circuit Court forthwith to certify to this Court true copies of the judgment, proceedings and record which have been entered, had and made, by said Circuit Court in the premises, against your petitioner and under which he is now deprived of his liberty, by judgment of said Circuit Court. And as in duty bound he will always pray, &c.

ROBERT BOYD,
Petitioner.

ROGER M. SHERMAN,
Attorney for the Petitioner
234 Broadway,
N. Y. City.

SOUTHERN DISTRICT OF NEW YORK, ss.:

ROBERT BOYD, being duly sworn, deposes and says that the foregoing petition is true to his knowledge, information and belief.

ROBERT BOYD.

JOSEPH M. DEUEL,
United States Commissioner,
Southern District of New York.

Exhibit A.

At a Stated Term of the Circuit Court, of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the City of New York, on Monday the 19th day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

Present—THE HON. SAMUEL BLATCHFORD, Circuit Judge.

THE UNITED STATES OF AMERICA

AGAINST

ROBERT BOYD, impleaded with FRANCIS O'ROURKE and MORITZ MILLINGER.

It having been made to appear to this Court by the affidavit of Edward B. Hill, Assistant United States Attorney, that judgment has been recovered in this action in favor of the plaintiffs herein against the defendants Robert Boyd and Francis O'Rouke, and that an execution against the property of the said defendants has been duly issued to the Marshal of this District upon the aforesaid judgment, and that said execution has been returned by the said Marshal wholly unsatisfied except in the sum of $200, leaving a balance due these plaintiffs on said judgment of $8,128 $\frac{92}{100}$, and that said balance still remains due and unpaid as stated and set forth in said affidavit; it is therefore hereby,

Ordered that it be referred to Joseph M. Deuel, Esq., a Commissioner of this Court, to examine the said Robert Boyd and Francis O'Rourke and take an-

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, *ex rel.* Robert Boyd,
vs.
HENRY E. KNOX, Marshal, &c.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Robert Boyd, being duly sworn, deposes and says as follows: I am the petitioner in an action above entitled. I am upwards of sixty-nine years of age and infirm. The order for my commitment in the petition herewith described requires my actual imprisonment, and the attorney for the United States opposed the entry of any order that would enable me to be bailed, and although he has consented to my release upon recognizance until Tuesday, April 18, 1882, at 3 o'clock in the afternoon, insists upon the terms of the order being thereafter executed. I am informed that the Supreme Court is about to adjourn, and that unless a writ is issued forthwith, I may be imprisoned until December next before it will be possible for the Supreme Court to entertain my petition. Any imprisonment would shorten my life.

ROBERT BOYD.

Sworn before me this 14th day of April, 1882.

JOHN A. OSBORN,
U. S. Commissioner, Southern District of New York.

FILED
APR 24 1882

Supreme Court of the United States.

THE UNITED STATES,
EX REL. ROBERT BOYD,
vs.
HENRY E. KNOX,
MARSHAL, &C.

Statutes Referred to in Relator's Brief.

AN ACT TO SIMPLIFY AND ABRIDGE THE PRACTICE, PLEADINGS, AND PROCEEDINGS OF THE COURTS OF THIS STATE, PASSED APRIL 12, 1848.

Whereas, it is expedient that the present forms of actions and pleadings in cases at common law should be abolished, that the distinction between legal and equitable remedies should no longer continue, and that a uniform course of proceeding, in all cases, should be established; therefore the people of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. Remedies in the courts of justice are divided into—1. Actions; 2. Special Proceedings.

§ 2. An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

§ 3. Every other remedy is a special proceeding.

§ 4. Actions are of two kinds:

1. Civil.

2. Criminal.

§ 5. A criminal action is prosecuted by the people of the State, as a party, against a person charged with a public offence, for the punishment thereof.

§ 6. Every other is a civil action.

§ 69. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

Part II., Chapter 11.

Proceedings supplementary to execution.

§ 292. (1.) When an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, * * * is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the court * * * requiring such judgment debtor to appear and answer concerning his property, before such judge at a time and place specified in the order, within the county to which the execution was issued. * * *

(3.) On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness.

* * * * * * * *

(5.) No person shall, on examination pursuant to this chapter, be excused from answering any question on the

ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question on the ground that he has, before the examination, executed any conveyance, assignment, or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

§ 295. Witnesses may be required to appear, and testify in any proceedings under this chapter, in the same manner as upon the trial of an issue.

§ 296. The party or witness may be required to attend before the judge, or before a referee appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee, under this chapter, shall be on oath.

§ 297. The judge may order any property of the judgment debtor, not exempt from execution in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment.

* * * * * * * * *

§ 298. The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner, and with the like authority, as if the appointment was made by the court, according to § 244*. But before the appointment of such receiver the judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall

be appointed. The judge may also, by order, forbid a transfer, or other disposition of the property of the judgment debtor, not exempt from execution, and any interference therewith. Whenever the judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the county where the judgment-roll in the action * * * is filed; and the said clerk shall record the order in a book to be kept. * * * A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order as aforesaid. The receiver of the judgment debtor shall be subject to the direction and control of the court in which the judgment was obtained, upon which the proceedings are founded. * * * But before he shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded in the office of the clerk of the county in which any real estate of such judgment debtor, sought to be affected by such order, is situated, and also in the office of the clerk of the county in which such judgment debtor resides.

§ 299. If it appear that a person, or corporation, alleged to have property of a judgment debtor, or indebted to him, claims an interest in the property adverse to him or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver, but the judge may, by order, forbid a transfer, or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution; but such order may be modified or dissolved, by the judge granting the same, at any time, on such security as he shall direct.

§ 300. The judge may, in his discretion, order a reference

to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, or at any time.

§302. (1.) If any person, party or witness, disobey an order of the judge or referee, duly served, such person, party or witness, may be punished by the judge as for a contempt. (2.) And in all cases of commitment under this chapter * * the person committed may in case of inability to perform the act required or to endure the imprisonment, be discharged from imprisonment, by the court or judge committing him, or the court in which the judgment was rendered, on such times as may be just.

Chapter V, Provisional Remedies.

§ 244. A receiver may be appointed—

* * * * * * *

2. After judgment, to carry the judgment into effect.

3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pending of an appeal, or when an execution has been returned satisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

* * * * * * *

When it is admitted by the pleading or examination of a party that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.

* * * * * * *

Supreme Court of the United States.

THE UNITED STATES,
EX REL. ROBERT BOYD,
v.
HENRY E. KNOX,
MARSHAL, &c.

STATEMENT.

The relator is restrained of his liberty by the U. S. marshal for the Southern District of New York, under a commitment for contempt by the U. S. Circuit Court for that District.

The contempt is his refusal to be sworn in "proceedings supplementary to execution," founded upon a judgment at law in that court. That court has jurisdiction of his person and the subject-matter of such proceedings, if at all, by the service of an order, a copy of which is annexed to the petition, exhibit A.

The statute of the State of New York under which such proceedings are taken is an act of Ap'l 12, 1848, as amended, entitled "An act to simplify and abridge the practice, pleadings and proceedings of the courts of this State." Those parts of the statute in question, as amended, are submitted with this brief. This statute is applicable to procedure in the courts of the United States, if at all, by force of § 916 Revised Stats.

The position of the relator is that "proceedings supplementary to execution" are, in substance and effect, proceedings in equity in the nature of a creditor's bill for discovery; that in the Federal courts such proceedings must be by *subpœna* and bill on the equity side; that they are not, in the sense of § 916 R. S., a remedy in common law causes, but, on the contrary, are part of a code to amalgamate and indiscriminate common law causes and suits in equity, in New York; that their application to the Federal courts is not only precluded by force of the terms of § 916 R. S., but also by the policy of the statute in *pari materia* (§ 915 R. S.) and by § 2, article III of the Constitution of the United States, which preserves and establishes the distinction between remedies at law and in equity. The relator accordingly submits that the court by whose mandate he is deprived of his liberty is without jurisdiction of his person and of the subject matter upon which it has proceeded, and that its commitment is void.

BRIEF FOR RELATOR.

POINTS.

I.

Where the U. S. Circuit Court is without jurisdiction of the person or of the cause, and a party is subjected to illegal imprisonment in consequence, the proceedings may be reviewed by *habeas corpus* out of the Supreme Court:

Ex parte Barry, 2 How., 65.
Ex parte Lange, 18 Wall., 163.
Ex parte Parks, 3 Otto, 18, 21, 22.

II.

The courts of the United States, *both by the Constitution*

and by the acts of Congress, are required to observe the distinction between legal and equitable rights and to enforce them, respectively, by legal and equitable remedies:

Robinson *v.* Campbell, 3 Wheat., 212.
Bennett *v.* Butterworth, 11 How., 669, 674, 5.
Jones *v.* McMasters, 20 *Ibid.*, 8, 22.
Fenn *v.* Holmes, 21 *Ibid.*, 484, 487.
Green *v.* Custard, 23 *Ibid.*, 484, 486.
Thompson *v.* Railroad Co., 6 Wall., 134, 137.
Basey *v.* Gallagher, 20 Wall., 670, 680.
Smith *v.* Railroad Cos., 99 U. S., 398.

Negative words are not necessary in the Constitution to preserve the distinctions there established:

Marbury *v.* Madison, 1 Cr., 174, 175.

In Thompson *v.* Railroad Companies, 6 Wall., 134, 137, this court says:

"The Constitution of the United States and the acts of Congress, recognize and establish the distinction between law and equity. The remedies in the courts of the United United States are, at common law or in equity, not according to the practice of State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles, 'and although the forms of proceedings and practice in the State courts shall have been adopted in the circuit courts of the United States, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit.'"

In Smith *v.* Railroad Companies, 99 U. S. 400, this court says:

"The law of procedure there (Kansas) recognizes but two

forms of action: one is designated a civil, the other a criminal action.

The former relates to the assertion of civil rights by suit. * * *

The Circuit Court of the United States of that District has, nevertheless, full equity jurisdiction. The Federal courts have it to the same extent in all the States and State legislation cannot affect it. The States, however, may create equitable rights, which these courts will enforce where there is jurisdiction of the parties and of the subject matter. This bill, (a common creditor's bill,) as regards this point, was well filed in the court to which it was addressed."

III.

A creditor's bill founded upon a judgment is a well known subject of exclusive, equity jurisdiction, irrespective of statute

Lorman *v.* Clarke, 2 McLean, 568, 578.
Smith *v.* Railroad Co., 99 U. S., 398, 400, 401.
Hendricks *v.* Robinson, 2 Johns. Ch., 283, 296.
Brinkerhoff *v.* Brown, 4 Johns. Ch., 671, 676, 680.
Hadden *v.* Spader, 20 Johns. R., 554, 563, 564.
Angell *v.* Draper, 1 Vern., 398.
Leith *v.* Pope, 2 Dick., 575.
Horn *v.* Horn, Amb., 79.

In those States which preserve the distinction between law and equity, unquestionably a decree upon a creditor's bill filed in the Circuit Court might be reviewed in this court by appeal. The form of pursuing that remedy under the New York Code cuts off that right.

It does not then assume such a form that the judicial power is capable of acting on it. Congress and the Consti-

tution do not leave the question of review to vary with the practice in different States:

Osborn *v.* U. S. Bank, 9 Wheat., 738, 819.
United States *v.* King, 7 How., 833, 844, 845.
United States *v.* Turner, 11 How., 663, 667.
Parish *v.* Ellis, 16 Pet., 451–454.

IV.

The question raised here is jurisdictional:

Rhode Island *v.* Mass., 12 Pet., 657, 719, 720.

V.

The learned judge of the circuit court by his opinion placed the decision upholding the proceedings in question upon § 916 of the Revised Statutes, "as part of a proceeding for reaching property of the judgment debtor in his hands and for ascertaining the condition of what was or is his property."

In criticism of his decision it is submitted that "remedies in common law causes," as used in § 916, means such as are provided by State laws conformably to the essential nature of actions at law as distinguished from suits in equity. § 915 in *pari materia* confirms this construction. Supplementary proceedings are not of that nature.

A. The New York code abolishes all distinctions of procedure between legal and equitable actions.

B. The provisions of that code which authorize supplementary proceedings are substituted for a creditor's bill, are essentially proceedings in equity *de novo* and the same rules of decision are applied to them as to creditor's bills in equity:

Sale *v.* Lawson, 4 Sandf. R. 718.
Davis *v.* Turner, 4 How. Pr. 190, 192, 193.
Corning *v.* Tooker, 5 How. Pr. 16.

Lilliendahl v. Tellerman, 11 How. Pr. 528.
Allen v. Starring, 26 How. Pr. 59.
Orr's Case, 2 Abb. Pr. 458.
Driggs v. Williams, 15 Ib. 479.
Keily v. Dusenbury, 2 Abb. New Cases 364.
Griffen v Dominguez, 2 Duer, 658.
Irwin v. Chambers, 8 J. & S. (40 N. Y. Super.) 434, 435.

In Griffen v. Dominguez it was said (p. 658) that the defendant was not precluded by judgment from setting up his privilege under the act of Congress as a foreign consul in bar of these proceedings. The court says:

"An order for the examination of a judgment debtor is not a mere process to enforce the execution of the judgment. It is not founded upon the judgment alone, but upon the averment of new facts, which the plaintiff must prove to entitle him to the relief that is sought. As a substitute for a creditor's bill it is, in its nature, a new suit."

So also

Driggs v. Williams, *supra*.
Allen v. Starring, *supra*.

In Irwin v. Chambers, *supra*, the general term of the Superior Court held that, for the limited purpose for which the opinion under review here sustains them, these proceedings are unauthorized. The court says, pp. 434, 435:

"Counsel claimed that even if the judge properly declined to make an order that the salary be paid over, that he had a right to proceed to an examination to disclose facts upon which a receiver of the defendant's property might be appointed.

"The language of the law is clear and imperative. * * But the letter of the law should not be forced into an application to circumstances not intended by the section. In the

nature of the case from necessity the broad language should be limited by general principles of law and equity made paplicable to general provisions for procedure.

* * * * * *

"*At all stages the proceeding should appear to be for the the purpose of the statute;* i. e., *to obtain property and not for the purpose* of having the examination only. The section is a summary proceeding in lieu of or in addition to the right to a creditor's action. Equitable principles must be applied in both cases."

ROGER M. SHERMAN,
of Counsel for Relator,
234 *Broadway, New York City.*

OFFICE SUPREME COURT U.S.
FILED
APR 24 1882
JAMES H. McKe...

In the Supreme Court of the United States.

BOYD
vs.
KNOX, MARSHAL, &c.

BRIEF FOR THE MARSHAL.

Admitting the allegations in the petition to be true, it seems that no case is made for the issue of a writ of habeas corpus.

In this connection it is submitted that section 916 of the Revised Statutes (act of 1872, ch. 255, sec. 6), has adopted for United States courts sitting in New York, as *a remedy by execution or otherwise* to reach property, the statutory provision of that State under which the petitioner is imprisoned.

Section 916 is as follows:

> The party recovering a judgment in any common law cause, in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws heretofore enacted which may be adopted by general rules of such circuit or district court, and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

The New York law, made up of statutes passed in 1851 and before, and quoted at length in the brief of the learned counsel for the petitioner, enacts in substance that when an execution against property for $25 or more is returned unsatisfied, the creditor may have an order requiring the debtor to appear before a judge and answer concerning his property; whereupon such proceedings may be had for the application of property thus discovered to the judgment as are provided upon the return of an execution.

Unless there be an objection aliunde to the results of such interpretation, it seems plain that the remedy given by this statute is within the scope of the above section of the revisal; for Boyd is a judgment debtor in a suit upon a bond; an execution against his property therefor has been returned unsatisfied; and due affidavit and application has been made as a foundation for the examination.

Supposing the remedy to be, as is contended by the petitioner, of an *equitable* origin, still it is entirely competent for Congress, by statute, to give to courts of law jurisdiction over remedies that previously were merely equitable. Whatever the nature of such a remedy anterior to the statute, afterwards it becomes also *legal*.

In none of the numerous cases in the reports of this court upon the subject of the adoption of State remedies by United States courts, is any question made as to the competency of such adoption by statute.

Section 916 does not qualify the character of the remedies which it authorizes by the expression "*agreeable to the principles and usages of law*," employed in the same connection, in the judiciary act of 1789. Yet, even in that phrase the word "law" was held to mean more

than "common law." In Bank *vs.* Halstead (10 Wheat., p. 56), this court said:

> The precise limitations and qualifications of this power, under the terms *agreeable to the principles and usages of law*, is not, perhaps, so obvious. It doubtless embraces writs sanctioned by the principles and usages of the common law. But it would be too limited a construction, as it respects writs of execution, to restrict it to such only as were authorized by the common law. It was well known to Congress that there were in use in the State courts writs of execution other than such as were conformable to the usages of the common law. If it had been intended to restrict the power to common law writs, such limitation would probably have been imposed in terms.

It appears by this that from the very origin of the government United States courts of common law have been empowered by statute to make use of writs of execution other than those at common law, and amongst others presumably such as originally were merely *equitable.*

Nor upon examination does there appear to be any essential unfitness in a common law court to administer the particular remedy in question. This remedy is of a sort not unusual amongst the statutory remedies given to courts of common law. It is like that (for instance) familiar under execution by *ca. sa.*, as modified by the principle underlying the *Lord's act* of George II, so generally enforced throughout the United States a few years since.

Both are remedies against judgment debtors, to eke out a satisfaction not obtainable under ordinary execution; both depend mainly upon an examination of the debtor, whilst the difference, *that under the ca. sa. he is made willing to answer by the hope of thereby obtaining liberty, whereas in the supplementary proceedings his will-*

ingness may come of his hope that thereby he may avoid losing it, seems immaterial!

That somewhere amongst the *supplementary proceedings* given by the various statutes in force upon this subject in New York there may be some which the machinery of a court of law is insufficient to enforce, and which, therefore, the general words of section 916 do not include, may (for the argument only) be admitted; but such *supplementary proceedings* are not *a unit*. The present proceeding, for instance, is distinct from others of the same class, beginning and ending as it may, with *examination and evidence* taken before a judge; the distinction betwixt such a case and that which was before this court in McCracken *vs.* Heyward, 2 How. 608, turns upon this suggestion, and is substantial. There a State statute required an appraisement, *by three specified persons*, as a necessary preliminary to any sale by execution. Thereupon this court said that the circuit court could not adopt such method of appraisal, *modified by a proviso that it might be made by two out of the three appraisers.*

The reason seems obvious, for *appraisement* is a unit, and must be taken as given, but *supplementary proceedings* are *various*, and that the powers of a court of common law are not competent to give effect to all of them, will not prevent the general words of section 916 from applying to as many of them as are consistent with such powers.

S. F. PHILLIPS,
Solicitor-General.

MEM.—I append the opinion of the learned judge, who, in the court below, passed upon the general question involved in this proceeding:

Circuit court of the United States for the southern district of New York.

THE UNITED STATES
vs.
ROBERT BOYD.

Blatchford, J. S. Regarded as a proceeding to examine the judgment debtor and witnesses respecting this property, which is the scope of the order in this case, the proceeding is fully warranted by section 916 of the Revised Statutes, as part of a proceeding for reaching property of the judgment debtor in his hands, and for ascertaining the condition of what was or is his property. The question of proceeding against property which has passed to others is not involved in this matter. Even if the proceedings be of an equitable character, Congress had undoubted power to authorize either the circuit court or the district court to pursue it in enforcing a judgment recovered in such court itself.

swers on oath concerning their property and to reduce such answers and examination to writing and also to examine on oath concerning such property, such witnesses as may be offered by the respective parties, and reduce such examination to writing and report such answers and examination, and all his proceedings under and by virtue of this order to this Court with all convenient speed, and the said Deuel is hereby appointed a Referee in this action for the purposes aforesaid.

And it is further ordered that the said Robert Boyd and Francis O'Rourke, do appear before the said Referee at his office in the Post Office building, New York City, on the 22d day of May, 1879, at eleven o'clock A. M., to answer before said Referee concerning their property as aforesaid; and for that purpose to appear before the Referee from time to time as he shall direct and appoint.

(Sgd) SAMUEL BLATCHFORD.

H. H. M.

A copy

J. M. DEUEL,
Clerk.